CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908

No. 88.

E HENRY DUBOIS SONS COMPANY AND THE STEAM TUG "EUGENE F. MORAN," MICHAEL MORAN, CLAIMANT,

vs.

F STEAM TUG "CHARLES E. MATTHEWS," JOHN D. DAILY ET AL., CLAIMANTS.

A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MAR 16, 1907.

(20,721.)

(20,721.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 319.

THE HENRY DUBOIS SONS COMPANY AND THE STEAM TUG "EUGENE F. MORAN," MICHAEL MORAN, CLAIMANT,

vs.

THE STEAM TUG "CHARLES E. MATTHEWS," JOHN D. DAILY ET AL., CLAIMANTS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 29, 1908.

1 United States Circuit Court of Appeals, Second Circuit.

THE HENRY DUBOIS SONS CO., Libellant-Appellant,
vs.
THE STEAMTUG "EUGENE F. MORAN"—MICHAEL MORAN, Claimant-Appellant; THE STEAMTUG "CHARLES E. MATTHEWS"—JOHN D. DAILY and Ano., Claimants-Appellees.

This cause comes here upon appeals from a decree of the district court, Southern District of New York in favor of libellant for one-half of its damages against the two tugs, in equal proportions against each. The suit was brought *in rem* to recover damages resulting from a collision and numerous assignments of error were presented and considered by this court and conclusion reached thereon by its opinion, herewith transmitted. Upon one point however, viz: in what proportions the several offending vessels shall be required to contribute to pay the damages, this court desires instruction before finally disposing of the cause and therefore elects to certify that question to the Supreme Court.

Statement of Facts.

About 7:30 P. M. of February 1, 1905 the tug "Moran" was towing two mud scows out of a slip on the west side of the Hudson River, bound for the dumping grounds. Scow 15 D was immediately behind the "Moran" on a hawser, and was followed by Scow 18 D on another hawser. Both scows were owned by libellant. While thus proceeding they encountered the tug "Matthews" coming up river with a car float belonging to the N. Y. Central
2 & H. R. R. Co. in tow. A single employee of the R. R. Co. was on board the car float, coiling up lines and getting the float ready for dock, and an employee of the tug was standing on top of the cars, keeping lookout. No employee of the railroad company participated in any way in the navigation of these two vessels, which was conducted solely by the master of the tug. Collision ensued between the car float and Scow 15 D. The car float was not guilty of any fault in her own management, and neither she, nor Scow 18 D have been made parties or brought in on petition under the 59th rule.

The tug Matthews was guilty of faults of navigation which contributed to the accident. Neither the Scow 15 D nor the Scow 18 D displayed the lights required by the rules of navigation. There was an employee of the owner in charge of each scow and it was their duty as well as the duty of the master of the tug to have the lights put up. Both scows therefore and the "Moran" were guilty of a common fault contributing to the accident. Besides the "Moran" was guilty of other faults of navigation, also contributing to the accident.

Question Certified.

Upon the facts above set forth the question of law arising upon which this court desires the instruction of the Supreme Court is: "In what proportions shall the damages sustained by the libellant be assessed upon the offending vessels."

In accordance with the provisions of Section 6 of the Act of March 31, 1891, establishing courts of Appeal, etc., the foregoing question of law is by the Circuit Court of Appeals for the
3 Second Circuit hereby certified to the Supreme Court.

April 30, 1907.

WM. J. WALLACE,
Circuit Judge.
E. HENRY LACOMBE,
Circuit Judge.
WM. K. TOWNSEND,
Circuit Judge.

4 United States Circuit Court of Appeals, Second Circuit.

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing certificate was filed and entered of record in my office on the 30th day of April 1907, and by direction of the Judges of the said Court, said certificate is forwarded to the Supreme Court of the United States.

Dated New York, May 2nd, 1907.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

5 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. The Henry Dubois Sons Co., Lib'l't-Appellant, *vs.* The Steamtug "Eugene F. Moran," Michael Moran, Cl'm't-Appellant, and others. Certificate. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 30, 1907. William Parkin, clerk.

Endorsed on cover: File No. 20,721. U. S. circuit court appeals 2d circuit. Term No. 319. The Henry Dubois Sons Company and The Steam Tug "Eugene F. Moran," Michael Moran, claimant, *vs.* The Steam Tug "Charles E. Matthews," John D. Daily *et al.*, claimants. (Certificate.) Filed May 16th, 1907. File No. 20,721.

FILED
JAN 26 1909
JAMES H. McKENNEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 87.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO., LIBELLANT,

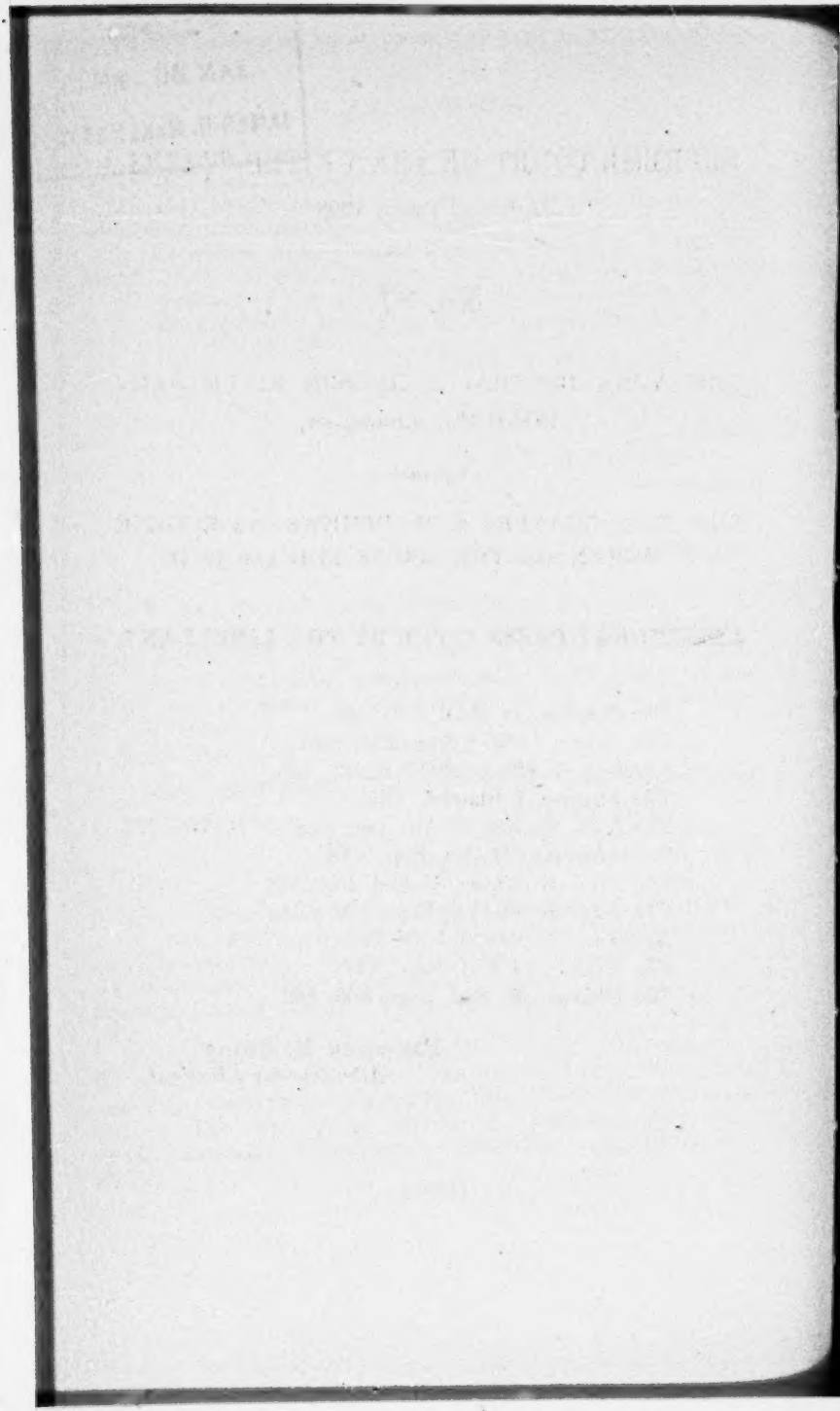
against

THE TUGS CHARLES E. MATTHEWS AND EUGENE F. MORAN AND THE SCOWS 15 D AND 18 D.

ADDITIONAL CASES CITED BY THE LIBELLANT.

The Cleadon, 14 Moo. P. C., 92.
The Niobe, [1891] App. Cas., 401.
Sherlock v. Alling, 93 U. S., 99, 108.
The Express, 1 Blatchf., 365.
The J. H. Gautier, 11 Am. Law Reg., N. S., 769, 772.
The Alabama, 22 Fed. Rep., 449.
The Fred. W. Chase, 31 Fed. Rep., 90.
The Express, 46 Fed. Rep., 860, 863.
Evans v. The Starbuck, 61 Fed. Rep., 502.
The Rescue, 74 Fed. Rep., 847.
The Chicago, 78 Fed. Rep., 860, 863.

FREDERICK M. BROWN,
Advocate for Libellant.



JAN 22 1909
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM.

No. 87.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO.,

Libelant,

against

THE TUGS CHARLES E. MATTHEWS AND EUGENE F. MORAN AND THE SCOWS 15D AND 18D.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

WALLACE, BUTLER & BROWN,
Proctors for Libelant.

ARCHIBALD G. THACHER,
FREDERICK M. BROWN,
Advocates.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

United States Supreme Court.

The steamtug "EUGENE F. MORAN," MICHAEL MORAN, claimant, and the scows "15 D" and "18 D," the HENRY DUBOIS SONS CO., claimant, vs. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY and the steamtug "CHARLES E. MATTHEWS," JOHN D. DAILY *et al.*, claimants.	No. 87. October Term, 1908.

Brief on Behalf of New York Central & Hudson River Railroad Company.

Statement.

This cause, tried in the United States District Court for the Southern District of New York, comes to this Court upon the certificate of the Circuit Court of Appeals for the Second Circuit, requesting instructions as to the apportionment of the damages.

The libel was filed by the New York Central & Hudson River R. R. Co. against the tug *Charles E. Matthews,* which was towing one of the railroad company's carfloats, and against the tug *Eugene F. Moran,* and scows *15 D* and *18 D,* to recover the damages sustained by the carfloat in collision with scow *15 D.*

The carfloat was lashed to the port side of the *Matthews* (owned and navigated by different parties), and was north-bound in the Hudson River.

The Dubois scows *15 D* and *18 D* were in tow astern of the *Moran,* "tandem," on hawsers, one behind the other; this tow was south-bound and was proceeding down the Hudson River.

A collision occurred between the two flotillas, the carfloat striking the scow *15 D,* the first scow astern of the *Moran,* sinking her and damaging the carfloat.

The District Judge held the *Matthews* to blame for various faults of navigation, condemned each of the scows, for the separate fault of not carrying lights as prescribed by law, and the tug *Moran* for this fault in common with her scows, also finding her to blame for separate and additional faults in her navigation.

The carfloat was found free from fault.

The District Judge divided the damages sustained by the carfloat into four equal parts and decreed that each of the tugs and each of the scows should pay one part.

On appeal, the Circuit Court of Appeals for the Second Circuit approved of the findings of fault against the various vessels made by the District Judge, but, in view of the conflicting decisions in the various circuits as to the correct method of

apportioning the damages in such a case, has requested the instructions of this Court.

The question certified is:

> "In what proportions shall the damages sustained by the carfloat be assessed upon the offending vessels?"

Whatever theory of apportionment may be adopted it is conceded, under the facts of this case, that the New York Central is entitled to recover its damages in full.

The railroad company has no pecuniary stake in the present controversy. Its counsel present for the consideration of this Court what they believe to be the true principles which should determine the decision of this question.

Its importance does not, of course, lie in deciding how much the various parties liable shall pay, but in determining the principle upon which that apportionment shall be based.

The principles enunciated by this Court in answering the question certified will have an important bearing upon future questions which are bound to come before it, arising under the Limited Liability Act and the statute commonly known as the Harter Act.

Possible Methods of Apportionment.

There are three possible alternatives by which to work out the various conflicting claims arising out of such a collision as the present:

(1.) Each tug and the vessels in tow of her may be regarded as a single flotilla or unit;

(2.) Each vessel may be regarded as a separate entity; or

(3.) Each tug may be regarded as an entity and the vessels composing the tow of each tug may be regarded as a single mass.

After it has been decided which of the foregoing propositions is to be accepted, subsidiary questions concerning the proper apportionment of damages may arise on grounds of:

(*a.*) The ownership of the various vessels involved;

(*b.*) Whether the tug and her tow were guilty of a single fault common to all, or

(*c.*) Whether all the vessels in one flotilla were guilty of separate and distinct faults; or

(*d.*) Whether the vessels in tow are guilty of a common fault, while the tug towing them is to blame for separate or additional faults.

It is probably true that the adoption of any one of the three theories suggested would not in every case imaginable work out apparent justice, but this is no more than saying that hard cases may arise.

It is believed that the true theory upon which to apportion the damages in such cases as the present, and the one most consonant with the fundamental and historical principles of the Admiralty, is to hold each tug and her tow a single unit, such unit to bear one-half of the total damages inflicted, each half of that damage to be subdivided among the various vessels comprising each flotilla upon the principles suggested in sub-heads (*a*), (*b*), (*c*) and (*d*).

It is not proposed to examine or to attempt to reconcile the various decisions of the lower courts in this country; all the authorities have been collected in the briefs of other counsel, and in view of the irreconcilable conflict they will only be referred to on questions of principle.

Admiralty Personifies the Vessel.

From the earliest times a vessel has been regarded as an actor, a *quasi*-personality, capable of motion under human guidance. Her mobility was the probable origin of her personification and when in motion she inflicted damage she was regarded as a guilty instrument and condemned or forfeited as such.

Her position in such case has been likened to the sword which killed a man or the tree from which he fell and was injured; such instruments of damage, though inanimate, were regarded as accursed, declared deodand and forfeited to the Crown.

This historical analogy was adopted in a unanimous opinion of this Court.

The Blackheath, 195 U. S. 361, 366.
Holmes, The Common Law, pp. 26-33.

> "A ship is the most living of inanimate things. * * * And we need not be surprised therefore to find a mode of dealing which has shown such extraordinary vitality in the criminal law applied with even more striking thoroughness in the Admiralty. It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible, and on that supposition they at once become consistent and logical."
>
> *Holmes, The Common Law, p. 26.*

Justice Brown vividly described the vital personality of a ship in a recent decision of this Court:

> "A ship is born when she is launched and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece

of personal property—as distinctly a land structure as a house, and subject only to mechanics' liens created by State law and enforcible in the State courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name. Her owners' agents may not be her agents and her agents may not be her owners' agents. (Citing cases.)

She is capable, too, of committing a tort, and is responsible in damages therefor. She may also become a *quasi* bankrupt; may be sold for the payment of her debts, and thereby receive a complete discharge from all prior liens, with liberty to begin a new life, contract further obligations, and perhaps be subjected to a second sale."

Tucker v. *Alexandroff, 183 U. S. 424, 438.*

In the words of Justice Story "the thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing" (*The Palmyra, 12 Wheaton, 1, 14*); "it is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which or by the master or crew thereof a wrong or offence has been done, as the offender, without any regard whatsoever to the personal misconduct or the personal responsibility of the owner thereof" (*The Brig Malek Adhel, 2 How. 210*).

"Originally the primary obligation was upon the vessel, and that of the owner was not personal but merely incidental to his ownership" (*The China, 7 Wall. 53, 61*).

Speaking of the *China*, Justice Gray in a later case said:

> "That decision proceeded, not upon any authority or agency of the pilot, derived from the law of master and servant, or from the common law, as the representative of the owners of the ship and cargo; nor upon the law of contribution in general average as between them; but upon a distinct principle of the maritime law, namely, that the vessel, in whosesoever hands she lawfully is, is herself considered as the wrongdoer, liable for the tort, and subject to a maritime lien for the damages."
>
> *Ralli* v. *Troop, 157 U. S. 386, 402, 403.*

Approved in:

The John G. Stevens, 170 U. S. at p. 122.

The Barnstable, 181 U. S. 464, 467, 468.

Homer Ramsdell v. *Compagnie Générale Trans., 182 U. S. at p. 413-414.*

That the liability of the owner was merged in the liability of the ship, that it was a real as distinguished from a personal liability is shown by the earliest marine ordinances permitting the owner to surrender his "fortune de mer," namely, his vessel, to claimants, thus escaping further personal liability.

Bédarride, Commentaire, Vol. I, Art. 216.

Whatever its origin, the principle is clearly established in the Admiralty that "the vessel is treated by the maritime law as an actor and juridical person, capable of committing wrongs, and is pursued as a delinquent without regard to ownership

or agency" (*Matthews, J.*, in *The City of Norwich, 118 U. S. at p. 534*).

Unlawful and negligent contact impresses upon the instrument of wrong a lien, or, *jus in re*, in favor of the injured party which he may enforce by a proceeding *in rem* wherever the *res* may be found and irrespective of its ownership or change in its possession.

Tug and Tow Are Identified as One Vessel.

In every case of towage there is a common aim, and certain vessels are gathered into a flotilla having a common object. It is in every sense of the word a single enterprise; the tug supplies the motive power for the purpose of towing other vessels and their cargoes, either alongside of the tug or astern of it, to their destinations. Whether a tug carries the vessels which she is towing lashed to her side or on a hawser astern, should not in any way alter their legal liability to third parties (although it may afford greater opportunity for the multiplication of separate faults), nor should it affect the legal status subsisting between the vessels, however arranged. Where, for example, a tug like the *Matthews* has lashed to her side a carfloat, they should be regarded for all purposes a single vessel.

There are many examples in the decisions of the courts, both in this country and in England, holding that a tug and the vessels in tow of her should be regarded as one vessel.

They are unquestionably so in so far as the navigation rules are concerned:

> "The ship and the tug were in law one vesel, and that a vesel under steam."
>
> *The Civilita and The Restless, 103 U. S. 699, 701.*

Where a tug had been lashed to a large steamer it was held that until the tug separated herself from the steamer "the tug was in a legal sense part of the *Majestic.*"

Taft, J., in Robinson vs. *Detroit S. S. Nav. Co., 77 Fed. Rep. 883, 891.*

Such also was the view taken of the status of a tug and tow, both of which were the property of the same owner, by the Circuit Court of Appeals for the Ninth Circuit when the question was presented to that court whether in a limitation proceeding instituted by the common owner it was necessary to surrender both the tug and the barge. The court below had held that the proximate cause of the disaster was fault on the part of the barge. The Circuit Court of Appeals said:

> "When the tug made fast and took in tow the barge, to perform the contract of carriage, *the two became one vessel,* for the purpose of that voyage,—*as much so as if she had been taken bodily on board the tug, instead of being made fast thereto by lines*" . . . [p. 237].
>
> "But no question of proximate cause, we think, arises in the case, for the reason that the tug and barge are, in law, considered one vessel, for the purpose of the voyage in question, and, whether the accident giving rise to the loss and damage be directly attributable to the acts of the master of the barge or to those of the master of the tug, it is equally the negligence of the carrier, for which it contracted to be liable. It results that in according the petitioners a limitation of liability without the surrender of the tug *Ocklahama* the court below was in error" [p. 238].

The Columbia, 73 Fed. Rep. 226.

McKenna (Circuit Judge) dissented on a jurisdictional question relating to the appeal, but said:

> "I concur in the judgment requiring the surrender of the steamer or tug *Ocklahama*, as well as of the barge."

Where two tugs engaged in towing a flotilla of barges were the property of the same owners and were under the common direction of one navigator, although both had separate captains, Judge Brown, in the Southern District of New York, said:

> "It was immaterial on board which tug the master for the time being was or from which boat his orders were given. Both as related to the owners of the tugs and as related to the owners of the boat in tow, the *Bordentown* and the *Winnie* in taking the tow through to Kills, were in effect one vessel. . . .
>
> "Where all the tugs employed belong to the same owner and are under one common direction and are engaged in the service at the time when the fault is committed, they are in the same situation, as it seems to me, as a single vessel, as respects responsibility for the negligence of the common head. The words, 'such vessel,' in § 4283, embraces all such tugs."

The Court accordingly held that both tugs must be surrendered in the limitation proceeding.

The Bordentown, 40 Fed. Rep. 682, 687.

The theory of the identity of all vessels composing a tow has received the sanction of the English courts on "the principle of the tow and tug being in contemplation of law identified as one ship."

The Englishman and The Australia, 1894 Prob. 239.

Such an aggregation of vessels forms a common venture; the hulls of the barges are no more than floating cargo compartments and the tug's motive power necessary for the flotilla is placed in a separate hull for convenient application.

POINTS.

First.

A TUG AND HER TOWS SHOULD BE REGARDED AS A NAVIGABLE UNIT, RESPONSIBLE TO THE EXTENT OF THE TOTAL VALUE OF THE UNIT TO INNOCENT THIRD PARTIES. THE RIGHTS OF THE OWNERS OF THE COMPONENT PARTS TO BE ADJUSTED BETWEEN THEMSELVES.

Why should the owner of a large and valuable ship, seriously injured by collision with another vessel lashed to the side of a tug, be interested in the relations of ownership, employment or separation or identity of faults between the tug and her tow?

The aggregate mass navigated as a single unit and constituting a single marine venture has inflicted serious loss. If such aggregations are permitted to navigate in mass why should they, after a disaster, be heard to assert against an innocent third party that a portion only of the offending body is in fault and the redress of the sufferer limited to its value?

Is it not more consonant with public policy and the encouragement of commerce that the owner of such a vessel shall be entitled to recover his damages from the navigable unit which has inflicted them, than to permit a single owner or a number of owners to combine several vessels in a tow and escape

liability by showing that a fault committed by some particular one was the cause of the loss and the limit of recovery?

A sufficient answer, under certain facts, might be that this Court in *Sturgis* v. *Boyer, 24 How. 110,* had held otherwise, were it not that the reasons given by the Court for its decision in that case are not in accord with previous and subsequent well considered opinions of the same tribunal.

It was there held that where a vessel belonging to one owner is lashed alongside of a tug belonging to another, the tug being hired for the purpose of furnishing motive power and for transporting the ship between certain places, that the tug is in the position of an independent contractor, and is solely responsible to third parties if, without the fault of the tow, the tug brings the ship into collision with another vessel. This case is the leading authority for the proposition that if, under the facts as just stated, the value of the tug is insufficient to respond fully for the damages sustained by the third vessel, the latter can have no recourse against the tow which was the guilty instrument in the hands of the negligent navigators on the tug.

The reasons for the decision were stated by Justice Clifford as follows:

> "Vessels engaged in commerce are held liable for damage occasioned by collision on account of the complicity direct or indirect of their owners or the negligence, want of care or skill on the part of those employed in their navigation. Owners appoint the master and employ the crew, and consequently are held responsible for their conduct in the management of the vessel. Whenever, therefore, a culpable fault is committed whereby a collision ensues, that fault is imputed to the owners, and the vessel is just as much liable for the consequences as if it had been committed by the owner him-

> self. No such consequences follow, however, when the person committing the fault does not, in fact, or by implication of law, stand in relation of agent to the owners. Unless the owner and the person or persons in charge of the vessel in some way sustain towards each other the relation of principal and agent, the injured party can not have his remedy against the colliding vessel."

This Court is respectfully urged to reconsider that case in the light of its other decisions and the considerations which are now submitted.

That decision was based solely on the rules of the common law relating to principal and agent, and master and servant; its reasoning departs from the doctrines of the Admiralty as determined by this Court in many decisions.

In 1826 Judge Story declared "the thing is here primarily declared the offender" (*The Palmyra, 12 Wheat. 1, 14*), and it was not asserted that liability was predicated upon the acts of a master or crew beyond the scope of their agency.

The same Court in 1844, where the forfeiture of a vessel was sought on the ground of an alleged piratical aggression, expressly rejected the theory of agency and declared the vessel should be regarded as an offender (*The Brig Malek Adhel, 2 How. 210*).

No relation of agency or of master and servant exists between the true owner of a vessel and a charterer to whom the vessel has been demised and who employs and pays the officers and crew; nevertheless such a vessel is liable *in rem* to a cargo owner whose property has been damaged (*Schooner Freeman* v. *Buckingham, 18 How. 182*), and to another vessel damaged in collision by the negligence of the charterer's servants (*The Barnstable, 181 U. S. 464, 467, 468*).

Upon the same principle this Court has held that

a vessel is liable *in rem* for damages inflicted by the vessel solely through the fault of a pilot compulsorily placed in charge of her by law. The Court expressly rejected the theory of agency; speaking of the English rule it said:

> "In such cases the liability of the ship and of the owner are convertible terms."

It then rejected this principle in the American Admiralty, and said:

> "The maritime law as to the position and powers of the master, and the responsibility of the vessel, *is not derived from the civil law of master and servant, nor from the common law.* It had its source in the commercial usages and jurisprudence of the middle ages. Originally the primary obligation was upon the vessel, and that of the owner was not personal, but merely incidental to his ownership * * *"
>
> According to the admiralty law, the collision impresses upon the wrongdoing vessel a maritime lien. This the vessel carries with it into whosesoever hands it may come. * * * The proposition of the appellants would blot out this important feature of the maritime code and greatly impair the efficacy of the system."
>
> *The China, 7 Wall. 53, 68.*

The concurring opinion of Justice Clifford shows that he feared the effect of the above decision upon the principles enunciated by him in *Sturgis* v. *Boyer.*

That the liability of the ship and of the owner are not convertible terms was finally settled when this Court held that the owner of a vessel is not liable at common law for damages inflicted by his ship owing to the negligence of a pilot compulsorily in charge of her.

> *Homer Ramsdell* v. *Compagnie Générale Trans., 182 U. S. 406, 413-414.*

It has been suggested that the explanation of these decisions is that the true owner when he places his property in the hands of a third party impliedly consents that it may be subjected to liens.

Such reasoning is unsatisfactory because the very question at issue is, to what liens is it then legally subject.

If, however, such an argument is deemed sound it may be asked why does not an owner who places his vessel in the hands of a tug-master to transport from place to place, subject his vessel to liens for collision, when, through the negligence of the tug-master, his vessel is brought into collision with another ship?

That liability *in rem* may be wholly unrelated to liability *in personam* is shown in another line of cases.

Although the United States are not subject to suit their property may be liable *in rem* for its share of a general average sacrifice, where such property has been shipped on a private vessel and the execution of the process does not interfere with the government's possession.

United States v. *Wilder, 3 Sumner, 308.*

Approved:

United States v. *Cornell, 202 U. S., p. 190.*

The same is true of the liability of government property *in rem* for salvage, although no suit would lie against the sovereign *in personam.*

The Davis, 10 Wall. 15, 22.

So where a prize, captured by officers of the United States, is in charge of a prize crew and by them negligently brought into collision with another vessel free from fault, a lien *in rem* against

the offending prize is established; this lien follows the proceeds of the sale of the prize into the hands of the prize court in favor of the third party and he may satisfy his lien out of the proceeds, although the government was the actor in asking condemnation. The Court appreciated the far-reaching scope of its decision and its possible effect upon the lien if the vessel had been declared not to be "good prize:"

> "As to the suggestion that a maritime tort, committed by a ship in possession of a prize master and crew, ought not to create a claim on the vessel against a neutral owner in case the vessel is restored, it is sufficient to say * * * that the claim in that event, if held to exist, would not be the subject of consideration by a prize court."

Nelson, *J.*, dissented on the ground that the government not being legally liable for the acts of its agents no liability could attach to the proceeds of the *Siren:*

> "But if the owner of the offending vessel is not liable at all for the collision, it follows, as a necessary legal consequence, that there can be no lien, otherwise the nonliability would amount to nothing. It would be idle to say that the owner was not liable for the wrong, and at the same time subject his vessel for the damages occasioned."

The majority of the Court held otherwise.

The Siren, 7 Wall. 152, 162.

Approved:

Workman vs. *The Mayor, 179 U. S. 552, 568.*

Conversely the municipal owner of a fire-boat may be liable *in personam* for its negligent navigation, although on grounds of public policy the Court would not have permitted a proceeding *in rem.*

Workman v. *The Mayor* (*supra*).

The futility of attempting to solve admiralty problems upon the basis of common-law doctrines of principal and agent is evidenced by the deliberate *dictum* of Lowell, Circuit Judge:

> "If she were navigated by pirates, who had run away with her, she would, in my opinion, be responsible to the injured ship."
>
> *The Arturo, 6 Fed. Rep. 308.*

It is true that the learned Judge, doubtless in deference to *Sturgis* v. *Boyer,* added:

> "If she is in tow, her liability does undoubtedly depend upon whether her master or the master of the tug commands the two vessels, if the negligence is that of the commander. This is a relaxation of the old doctrine of the liability of the vessel."

Why should there be any such relaxation?

What magic is there in the physical composition of a tug and tow or the relations existing between them, which should limit the rights of innocent third parties as against the navigable unit?

The following suppositious cases show that any such assumed relaxation is inconsistent with the fundamental principles of liability *in rem* and contrary to a long line of the decisions of this Court.

The owner of a large steamer wishes to move her from one point to another in New York harbor; her crew having been discharged he engages the services of a tug-master as an independent contractor for a lump sum to do the work, telling him he may do so either by a tug or by sending his own men on board to navigate the steamer:

(1) The tug-master elects to place a crew of his own men on board the steamer and navigate her under her own steam. Owing to his negli-

gent navigation a collision occurs between the steamer and another vessel free from fault.

Can there be any question but that the steamer is liable *in rem?*

No relation of master and servant or principal and agent exists between the independent contracting tug-master who employs and pays the crew and the owner of the steamer; nevertheless the latter is rendered a guilty thing.

(2) The tug-master elects to tow the steamer. During the towage, night comes on, and it is necessary under the rules that the steamer shall carry regulation lights; the tug-master, on the tug, fails to give the required directions and solely owing to the unlighted condition of the steamer a similar collision occurs.

Assuredly the steamer can be proceeded against *in rem;* the absence of lights renders her an offender, and the tug, jointly, for a common fault, for the tug-master should have caused the lights to be placed on the tow.

The Lyndhurst, 92 Fed. Rep. 681, 682.

(3) The tug-master elects to tow the steamer:

(*a*) He goes on board of her to handle her wheel. Owing solely to his faulty steering a similar collision occurs. Again the offense attaches to the *res* and the steamer must be held liable under the decisions of this Court.

(*b*) He sends his quartermaster on board the steamer to handle her wheel; the quartermaster obeys an improper order given by his captain standing on the tug and a similar collision results.

It is immaterial that the *causa causans,* namely, the improper order of the governing mind, occurred on the tug, and the physical result was

produced by the helm of the steamer—she again is an offender.

(*c*) The tug-master stands on the steamer's bridge and from it gives an erroneous order to his quartermaster on the tug (the steamer's helm and engines not being used) and a similar collision results.

Shall the right of the innocent third party to proceed against the valuable instrument of wrong exist in one case and not in the other? What logical distinction is there?

(*d*) Assume again that the tug-master elects to tow but that a few employees of the owner of the steamer, who are not expected to and do not take any part in her navigation, are on board of her. The tug-master navigates both vessels in all respects from the tug, in such fashion that a simliar collision occurs (*Sturgis* v. *Boyer*).

Is the tug-master any the less the *dominus* of the situation? Is the steamer in tow any less of an offender?

Such a situation is put on page 4 of the *Matthews brief*:

> "What would be the result of overruling *Sturgis* vs. *Boyer*, and establishing the rule of common entity?
>
> A ship worth, say, $100,000 is being towed by a tug worth $10,000. A collision occurs, due solely to the fault of the tug, between the ship and another vessel, whereby the latter vessel is damaged to the extent of say $50,000. The tug limits her liability to $10,000. The doctrine of common entity and the overruling of *Sturgis* vs. *Boyer* would mean that the innocent ship must pay the remaining damages, although she in no wise contributed to the collision."

We cannot answer the argument better than by quoting Justice Story's remarks, where an analogous argument was addressed to him:

> "It is said, that, in cases where the United States are a party no remedy by suit lies against them for contribution; and hence the conclusion is deduced, that there can be no remedy *in rem*. Now, I confess, that I should reason altogether from the same premises to the opposite conclusion."
>
> *United States* v. *Wilder, 3 Sumner, 308, 312.*

Is it not a misnomer to call the vessel in tow in such case an "innocent ship"? Should it not rather be said that the tow is an offender as part of a guilty navigable unit? That at least so far as third parties are concerned tug and tow should be regarded as an entity, liable, in case of the fault of any component, to the total value of the navigable unit.

If the argument be adopted that the owner of a vessel who charters her impliedly consents to the creation of liens upon her while navigated by the charterer's servants, both in contract and in tort, why is such reasoning not sufficient to establish similar liens when the same vessel is in the hands of an independent contractor selected by the owner?

The doctrines of the offending thing and the immateriality of the relation of principal and agent are firmly established in the Admiralty.

The identity of tug and tow as a navigable unit has the endorsement of high authority.

It is believed that the decision of *Sturgis* v. *Boyer* is the only existing objection against the acceptance of the theory of the identity of tug and tow toward third parties. An examination of other decisions of this Court and a consideration of the principles on which they were based should, it is submitted, lead to the establishment of the doctrines here advocated.

Second.

THE DAMAGES SUSTAINED BY THE NEW YORK CENTRAL CARFLOAT SHOULD BE MADE GOOD TO THE EXTENT OF THREE-SIXTHS BY THE "MATTHEWS," ONE-SIXTH BY THE "MORAN" AND ONE-SIXTH EACH BY SCOWS "15 D" AND "18 D."

If each tug and her tow be regarded as a single flotilla or navigable unit one-half of the New York Central's damages should be paid by the *Matthews*, since as between her and the carfloat the contractual responsibility of navigation rested upon the tug, and her value is sufficient to respond therefor.

The *Moran* flotilla as a navigable unit should also bear one-half of said loss.

The two scows having each been guilty of a separate and distinct fault, namely, the breach of the individual duty imposed by law of carrying lights, should *each* be held liable for one-third of that one-half or one-sixth apiece.

Had they been towing side-by-side they together would have been required by law to carry one light for their common protection; in which case we should have contended that they were jointly guilty of a single common fault and should have paid one-half of that flotilla's one-half, or one-quarter of the total carfloat damages.

The *Moran* having been guilty of separate and additional faults of navigation should pay one-third of one-half of her flotilla's loss, or one- sixth of the total carfloat's damages.

The separation of faults between the scows should control as against the accident of joint ownership and responsibility *in personam* should not be confused with a primary responsibility *in rem*.

It may also be pointed out here that if the flotilla or navigable unit theory be accepted it will work out absolute equality of burden where all the vessels in one tow are owned by one person and all the vessels in the other tow by a second.

The continental doctrine of an apportionment of damages based upon degrees of fault has from time to time been suggested in this country.

The Max Morris, 137 U. S. 1, 15.
The Victory, 68 Fed Rep. 395, 400.
The Geo. S. Shultz, 84 Fed Rep. 508, 512.

It is, however, respectfully urged upon this Court that it should not introduce this doctrine into the American Admiralty. The difficulty of the problems which may arise under the present system are amply illustrated in the present case and the burdens of judges and counsel should not be unnecessarily increased.

The importance of establishing, in the present case, the true principles which apply is enhanced by the changes which have occurred in the methods of transportation by sea.

Many carriers, owning barges and tugs, instead of using a single vessel to transport its own cargo, combine their craft into large flotillas; the barges serving the purpose of floating cargo compartments, the tugs representing the machinery of the steamer floated in a separate shell.

The importance of such changes and new methods was, at an early day, anticipated by this Court.

> "The introduction of this mode of loading and carrying grain by the railroads, and the competition which they presented to river transportation, introduced in the latter the use of barges, in which grain was carried in bulk, without sacks, and loaded from elevators, as was done by the railroads. This mode of river transportation, which is often auxiliary to the railroads, has superseded almost entirely the old mode of carrying by sacks in the hold of the vessel, and its present importance and future growth

can hardly be overestimated. It is therefore of great consequence to determine, upon sound principles, the rights and liabilities of the carrier and the owner of the cargo in these cases, in regard to these barges, so far as they are open for consideration.

"The barges are owned by the same persons who own the steamboats by which they are propelled, *and are generally considered as attached to and making part of the particular boat in connection with which they are used;* * * * *In every case, however, the barge is considered as belonging to the boat to which she is attached for the purposes of that voyage.*"

The Northern Belle, 9 Wall. 526, 528-529 (1869).

See also:

The Keokuk, 9 Wall. 517, 519.

When a carrier elects to transport cargoes by such means is not the cargo owner entitled to resort to the value of the tug or steamer as well as to the trifling value of an unseaworthy barge?

Third.

THE QUESTION CERTIFIED IN THIS CASE SHOULD BE ANSWERED BY DIRECTING THAT THE DAMAGES SUSTAINED BY THE CARFLOAT SHOULD BE ASSESSED THREE-SIXTHS AGAINST THE "MATTHEWS," ONE-SIXTH AGAINST THE "MORAN" AND ONE-SIXTH EACH AGAINST SCOWS "15 D" AND "18 D."

Respectfully submitted,

WALLACE, BUTLER & BROWN,
Proctors for New York Central
& H. R. R. Co.

ARCHIBALD G. THACHER,
FREDERICK M. BROWN,
Advocates.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1908.

Nos. 87 and 88.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Libellant

vs.

The tug CHARLES E. MATTHEWS
JOHN D. DAILEY, *et al.*, Claimants

the tug EUGENE F. MORAN,
MICHAEL MORAN, Claimant

and scows 15D and 18D,
HENRY DUBOIS SONS COMPANY, Claimant

HENRY DUBOIS SONS COMPANY,
Libellant

vs.

The tug EUGENE F. MORAN,
MICHAEL MORAN, Claimant

and the tug CHARLES E. MATTHEWS,
JOHN D. DAILEY, *et al.*, Claimants

ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR MORAN

These cases come before the Court on questions certified by the Circuit Court of Appeals for the Second Circuit as follows:

In the New York Central case the question certified is:

In what proportion shall the damages sustained by the carfloat be assessed upon the offending vessels?

In the DuBois case the question certified is:

In what proportions shall the damages sustained by the libellant be assessed upon the offending vessels?

The collision out of which the suits arose occurred in the evening of February 1, 1905, in the Hudson River. The tug *Moran* was towing two mud scows owned by the Henry DuBois Sons Company out of a slip on the west side of the river bound for the dumping grounds at sea. The scows were on a hawser, tandem, *15D* being the head scow and *18D* directly behind her. While thus proceeding they encountered the tug *Matthews* coming up the river with a carfloat belonging to the New York Central & Hudson River Railroad Company in tow alongside. The carfloat collided with scow *15D* and both vessels were damaged.

The District Court for the Southern District of New York found that the tug *Matthews* was in fault; that the carfloat was not in fault; that there were no lights on either of the scows; that both the tug *Moran* and the scows were in fault for not having up lights on the scows.

The opinion of the District Judge (Holt, *J.*) then proceeded as follows:

"The question then arises as to the apportionment of damages. The authorities are quite conflicting upon this subject. There are a number of authorities which hold that, in cases where one vessel is towing another, the tug and tow are to be considered as one vessel. The *Niobe*, 13 P. D. 55, [1891] App. Cas. 401; The *Englishman* and the *Australian*, L. R. 1894 Prob. 239; The *Anerly*, (D. C.) 58 Fed. 794; The *Komuk*, (D. C.) 120 Fed. 841. Other authorities hold that in such cases each vessel in

each flotilla is to be treated as a distinct entity, and each vessel in fault equally liable for any damage with the other vessels in fault. The *Brothers*, 2 Biss. 104, Fed. Cas. No. 1,969; The *Peshtigo*, (D. C.) 25 Fed. 488; The *Lyndhurst*, (D. C.) 92 Fed. 681; The *Nettie L. Tice*, (D. C.) 110 Fed. 461; The *Doris Eckhoff*, (D. C.) 41 Fed. 156; The *Maling*, (D. C.) 110 Fed. 227; The *S. A. McCaulley*, (D. C.) 116 Fed. 107.

I am entirely unable to reconcile these decisions. Neither rule, in certain cases, will work out complete justice. In my opinion, the rule which holds that each vessel in fault is to share equally with every other vessel in fault is upheld by the greater weight of authority, particularly in this country, and has the advantage of greater simplicity of application.

My conclusion is that the damage caused to the carfloat should be borne in equal one-quarter shares by the *Matthews*, the *Moran* and the two scows, and that the damage caused to the scow *15D* should be borne in the same proportion; that is, the scow itself should bear one-quarter of the loss, and the *Matthews*, the *Moran*, and the other scow should each bear one-quarter. As the scow *18D* belongs to the same owners as the scow *15D*, the decree in the case of the DuBois Sons Company should be for one-quarter of the damage against the *Matthews* and one-quarter against the *Moran*. The decree should provide, as usual, that if the value of any of the vessels held liable is insufficient to pay the amount decreed there shall be a remedy over against the others for the deficiency. The New York Central & Hudson River Railroad Company should have costs, divided in the same way, against the claimants in its suit, and the DuBois Sons Company should recover half its costs against the claimants in its suit."

Opinion of District Court, 143 Fed. Rep. 187 and 188.

An appeal having been taken by the Dubois Sons Company and Moran, claimant of the tug *Eugene F. Moran*, the Circuit Court of Appeals stated the facts briefly as appears at page 1 of the respective records and certified the questions above stated to this Court. They also rendered a *per curiam* opinion, 154 Fed. Rep. 41, in which they said:

"Under these circumstances shall the damages be assessed in equal proportions among the four offending vessels, or shall the two scows be considered a single vessel and damages assessed in thirds, or shall damages be first assessed equally between the two flotillas, and the half assessed on the south-bound flotilla be charged in thirds against each vessel composing it or half against the *Moran* and half against the two scows?

"The authorities are not all in accord. The *Komuk*, 120 F. R. 481; The *Niobe*, 13 P. D. 55, [1891] App. Cas. 401; The *Brothers*, 2 Biss. 104; The *Nettie L. Tice*, 110 F. R. 461; The *Express*, 44 F. R. 392, 46 F. R. 860, 52 F. R. 890; The *Peshtigo*, 25 F. R. 488; The *Lyndhurst*, 92 F. R. 681; The *Anerly*, 58 F. R. 794. A decision of the question by this court would be controlling only in this circuit, and it is highly desirable that it be settled by authority. We have therefore decided to certify the single question as to assessment of damages to the Supreme Court. When that is answered this Court will dispose of the decrees appealed from."

The questions put by the Circuit Court of Appeals in its opinion are somewhat more detailed than those certified. Separately stated, they are as follows:

In the suit of the New York Central Company, which is brought against the two tugs and the two DuBois scows, (1) each of the defendant vessels might be charged with one-fourth of the damages, or (2) the two scows might be treated as a single vessel and as such be condemned to pay a third of the Central's damages, while the tugs *Matthews* and *Moran* each pay a third, or (3) the two flotillas might be considered separately, and the New York Central recover one-half of its damages from its tug, the *Matthews*, and the other half from the tug *Moran* and the two scows considered as a mass, in which case (*a*) the *Moran* might pay one-fourth and the two scows another fourth, or (*b*) the *Moran* might pay one-sixth and each of the scows one-sixth.

Similarly in the DuBois case (1) the libellant might

have to bear one-half of its damages and collect one-fourth from the *Matthews* and one-fourth from the *Moran*, or (2) if the tows are considered as separate units the libellant might recover one-half of its damages from the *Charles E. Matthews* and the other half might be shared between the libellant and the tug *Moran*, (*a*) by the *Moran* paying either one-third of one-half, that is, one-sixth, or (*b*) one-half of one-half, that is, one-fourth.

POINTS

I.—THERE IS IN ENGLAND NO AUTHORITY FOR A DIVISION IN THIRDS, AND IN THIS COUNTRY THE DECISIONS TO THAT EFFECT, ALTHOUGH SOME OF THEM WERE MADE BY EMINENT JUDGES, DO NOT APPEAR TO HAVE BEEN CAREFULLY CONSIDERED.

"In America where three ships were all in fault for a collision between two of them the loss was divided between all three. There is no precedent for such an extension of the *rusticorum judicium* in England."

Marsden on Collisions, 5th ed., p. 125.

The American cases cited by Marsden are the *Peshtigo*, 25 Fed. Rep., 488; *The Brothers*, 2 Biss., 104; *The Maling*, 110 Fed. Rep., 227, and the *Harold*, 84 Fed. Rep., 698.

The Brothers, 2 Biss., 104, Fed. Cases 1969 (Drummond, *J.*, 1869). This was a collision between the propeller *Lady Franklin* and the schooner *Supply*, which was in tow of the tug *Brothers*. The Court held all three vessels to blame, saying:

"It may be said that the tug and the schooner (one being the agent of the other) constitute one part, and the propeller the other, and that the loss should be divided

accordingly. That would make the propeller pay one-half of the loss instead of one-third, but, on the whole, I can see no sufficient reason why the rule of equality should not apply to a case like this. * * *

"Without therefore deciding as to the division of damages in all cases where there may be fault in the steamer and its tow and in another vessel producing collision, I am of opinion in this case that it would be equity to divide the loss equally between all the parties."

The libellant took an appeal to the Circuit Court, and Mr. Justice Davis affirmed the decree of the lower court. All that he said as to damages was:

"But it is said if the *Franklin* is in fault, the Court erred in the rule of assessment of damages. This may or may not be true; but, if true, the error is in favor of the *Franklin*, of which she cannot complain. The only serious question in this case is whether the *Franklin* should not have been made to pay one-half of the loss."

In the *Peshtigo*, 25 Fed. Rep., 488 (Blodgett, *J.*, 1885), where the propeller *Tempest* collided with the barge *Peshtigo*, in tow of the propeller *Boscobel*, both the *Boscobel* and the *Peshtigo* being owned by the respondent, the Court found all three vessels in fault, and, without discussing the question, directed a division of the damages so that each vessel paid one-third.

The *Anerley*, 58 Fed. Rep., 794 (Brown, *J.*, 1893). This was a collision between the steamer *Anerley*, at anchor, with two barges, which drifted against her. The barges were held in fault for failing to put out anchors, and the *Anerley* was also held in fault for not taking measures to avoid the barges. The Court gave the *Anerley* a decree for one-half her damges. A motion was then made to divide the loss in proportion of one-third to each vessel, and Judge Brown said:

"It is unnecessary to consider at this time what should be done in cases like the *Brothers, supra*, and the *Peshtigo, supra*, where three vessels are adjudged in fault; because in this case before any damage arose the two

barges became entangled fast together and were practically one mass, and therefore as respects the subsequent negligence of the steamer and the resulting damage they should be treated as one" (p. 796).

The *Harold*, 84 Fed. Rep. 698 (Brown, *J.*, 1898). This was a collision between the schooner *Manson* and the barge *David Crockett* in tow of the tug *Harold*. The Court held all three vessels in fault and said as to damages:

"The damages and costs should be divided equally among the three vessels, the faults of each being independent of the others."

The *Lyndhurst*, 92 Fed. Rep. 681 (Brown, *J.*, 1899). These were suits brought by the owners of two barges in tow of the tug *Lyndhurst* against that tug and the tug *Andrew J. White*. The *White* collided with the outside barge and injured not only that barge, but the barge next to it. The Court condemned the *White* for insufficient lookout and held that the tow of the *Lyndhurst* did not exhibit a light on the outside barge as was required by the rules. For this fault he condemned not only the tug *Lyndhurst* and the outside barge herself, but the next barge, saying:

"The maintenance of these lights being in the interest and for the benefit of each boat in the tier, and not for the outside boats alone, the duty of attending to these lights by whomsoever on the tow that duty may be performed, is a duty undertaken in behalf of all the adjacent boats in the tier. * * * * * * * * * Each canalboat should therefore recover two-thirds of her damages from the other tugs." (p. 682.)

Scow No. 6H, 108 Fed. Rep. 429 (Thomas, *J.*, 1901). Here the libellant's two scows moored to a pier, broke adrift, and through the strain put on their mooring lines by the weight of three other scows which improperly made fast outside of them the libellant's scows

came into collision with some other vessels and sank. Judge Thomas held that one-third of the libellant's damages should be

"borne by the libellant and two-thirds by the outlying scows, each scow, as against the other outlying scows, bearing two-ninths of all the damages. The *Brothers; The Peshtigo.* The legality of such apportionment is recognized in the *Anerly*" (p. 432).

The *Maling*, 110 Fed. Rep. 227 (Bradford, *J.*, 1901). This was a collision between the dredge *Pacific*, anchored in the Delaware River, and the steamer *Maling*. The tug *S. A. McCaulley*, which was lying alongside the dredge, fastened to her by a line, was brought in on petition under the 59th Rule. The Court held all three vessels in fault. Judge Bradford said:

"All the vessels having been in fault, the *Maling* cannot be visited with more than one-third of the damages and costs. Another third must in any event be borne by the dredge. The remaining third would properly be recoverable from the tug had not the latter been induced by the dredge to do the precise thing which constitutes fault. * * * * * * * * * *

"But the fact of the inability of the libellant to recover one-third of the damages and costs from the tug cannot enlarge or in any manner change the primary liability of the *Maling* for one-third of the damages and costs (p. 240).

"For the reasons given, all the damages and costs must be divided between the *Maling* and the dredge, the *Maling* to bear one-third and the dredge the remaining two-thirds."

Same case *sub. nom.* The *S. A. McCaulley*, 116 Fed. Rep. 107.

The *Nettie L. Tice*, 110 Fed. Rep. 461 (Thomas, *J.*, 1901). This was a collision between a canalboat in tow of the tug *Tice* and a fireboat belonging to the City of New York. The Court held all three vessels in fault, and, following the *Lyndhurst*, gave the libellant a decree for two-

thirds of his damages and costs, directing that each of the tugs should bear one-third.

These are the only cases we have been able to find in which the damages have been divided in thirds.

II.—THE ONLY CLEAR WORKING RULE IS THAT WHERE A VESSEL HAS CONTRIBUTED TO A COLLISION BY HER OWN FAULT, HER OWNER CANNOT RECOVER MORE THAN ONE-HALF OF HIS DAMAGES.

The rule of the admiralty as to the apportionment of damages in case of mutual fault is not a rule of absolute justice, but one of practical utility. Instead of subjecting litigants to the uncertainty which would result from the different views which different judges might have as to the relative gravity of faults of navigation, a rule has been adopted in British and American jurisprudence which can easily be understood, and acted upon by seamen and shipowners. This rule should not be weakened by any subtle refinings.

In the DuBois case, where the libellant brought suit as owner of the scow *15D* against the two tugs, the District Court held the DuBois Company in fault: (1) for not having a proper light on the scow *15D*, which was damaged by collision, and (2) for not having a proper light on another of its scows, *18D*, in the same tow. The Court, therefore, held that "the scow itself (*15D*) should bear one-fourth of the loss, and the *Matthews* and the *Moran* and the other scow, *18D*, should bear one-fourth" (Opinion of Holt, *J.*). The result is correct, but the method of arriving at it erroneous. The libellant, the DuBois Company, having been guilty of fault contributing to the collision should recover only one-half its damages.

This would be true even if no fault were chargeable to scow *18D*. It matters not how many faults the DuBois Company was guilty of, nor whether its faults concern one of its vessels or a hundred; where it brings suit against two, or twenty-two, vessels which are held in fault, it is entitled to recover one-half its damages and no more, and the other half should be apportioned among the defendant vessels.

Counsel for the New York Central Company in his brief below argued that Sturgis *v.* Boyer (24 How., 110) was "at variance with previous and subsequent decisions of this Court"; but there is nothing necessarily inconsistent between that authority and the *China* (7 Wall.,53). Mr. Justice Clifford, who wrote the opinion of the Court in Sturgis *v.* Boyer, concurred in the decision of the *China*. It is true that he does not appear to have assented to the doctrine of *the offending thing,* but other eminent judges have also doubted it.

Thus, in the *City of Norwich,* 118 U. S., 468, Mr. Justice Bradley said:

"To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated, unless where, for public reasons, the law exempts particular kinds of property from seizure, such as the tools of a mechanic, the homestead of a family, &c. His property is what those who deal with him rely on for the fulfilment of his obligations. Personal arrest and restraint, when resorted to, are merely means of getting at his property" (p. 503).

In the *China* the doctrine was stated by Mr. Justice Swayne as follows:

"According to the admiralty law the collision impresses upon the wrong-doing vessel a maritime lien. This the vessel carries with it into whosoever hands it may come" (7 Wall., 53, 68).

In his concurring opinion, Mr. Justice Clifford said:

"The ship is as much liable in the one case" (where the charterer provides master and crew) "as in the other" (where the owner not only provides the vessel, but also selects the master and crew) "to a suit *in rem* for the injury committed, because she sailed on the voyage *as the property of the real owner and by his consent*" (p. 70).

The doctrine was stated very broadly by Mr. Justice Gray in his dissenting opinion in the case of Workman *v.* N. Y. City, 179 U. S., 552, as follows:

"By the general admiralty law of this country, often declared by this court, a ship, by whomsoever owned or navigated, is liable for an actionable injury resulting from the negligence of her master or crew to another vessel. *The Malek Adhel,* (1844) 2 How. 210, 233, 234; *The China,* (1868) 7 Wall. 53, 68; *Ralli* v. *Troop,* (1895) 157 U. S. 386, 403; *The John G. Stevens,* (1898) 170 U. S. 113, 120. But that does not warrant the inference that a libel *in personam* can be maintained against the owner for a tort which would neither sustain a libel *in rem* against the ship, nor an action at law against her owner" (pp. 586, 587).

And in Tucker *v.* Alexandroff, 183 U. S. 424, Mr. Justice Brown, speaking of a ship, said:

"She acquires a personality of her own; becomes competent to contract, and is individually liable for obligations, upon which she may sue in the name of her owner, and be sued in her own name. Her owner's agents may not be her agents, and her agents may not be her owner's agents. * * * She is capable, too, of committing a tort, and is responsible in damages therefor" (p. 438).

In the *Clarita* and the *Clara,* 23 Wall. 1, Mr. Justice Clifford said:

"Vessels engaged in commerce are held liable for damage occasioned by collision on account of the complicity, direct or indirect, of their owners, or the negligence, want of care or skill on the part of those employed in their navigation. Owners appoint the master and employ the crew, and consequently are held responsible for their conduct in the management of the vessel.

"Whenever, therefore, a fault is committed whereby a collision ensues, that fault is imputed to the owners, and the vessel is just as much liable for the consequences as if it had been committed by the owner himself. Consequences of the kind, however, do not follow when the person committing the fault does not in fact or by implication of law stand in the relation of agent to the owners. Unless the owner and the person or persons in charge of the vessel sustain in some way towards each other the relation of principal and agent the injured party cannot have his remedy against the colliding vessel" (p. 11).

In the *Alabama*, 92 U. S. 695, 697, Mr. Justice Bradley said:

"In short, *the moiety rule* has been adopted for a better distribution of justice between mutual wrongdoers."

The scope of the moiety rule is not limited to collision. The *Max Morris*, 137 U. S. 1. It is now applied generally in the Admiralty. Although Admiralty Rule 59 was originally promulgated for collision suits (see the *Hudson*, 15 Fed. Rep. 162) its application is now extended to almost any case where a third party is deemed to be answerable over, in whole or in part, to the respondent in the original cause. Thus a libellant, guilty of contributory fault, may nevertheless recover against a shipowner jointly with the charterer (*In re* N. Y. & P. SS. Co., 155 U. S. 523; the *Barnstable*, 181 U. S. 464), or against a shipowner and a co-defendant stevedore who may be loading the ship under contract (The *Manitoba*, 104 Fed. Rep. 145), or against one who negligently casts a vessel adrift (Dailey *v.* City of New York, 119 Fed. Rep., 1005).

It is submitted that the moiety rule, and not the rule of thirds, would be the only consistent remedy in all these instances, which are becoming of increasing importance.

In the New York Central case the libellant, being without fault, recovers its full damages. It has proceeded

against four separate vessels, all of which have been found by the Court guilty of fault contributing to the collision, and each of them was properly condemned to pay in the first instance one-fourth of the libellant's damages. It is true that had the New York Central Company proceeded *in personam* against the DuBois Company, as owner of the scows, and against the respective owners of the tugs *Matthews* and *Moran*, the decree would have run against the three respondents, and in the first instance each respondent would have been decreed to pay one-third of the libellant's damages. It may be unfortunate that a mere difference in the form of pleading and proceeding should produce such a result. But in suits *in personam* ownership and agency are prime considerations, whereas, according to the established doctrine of this Court, in collision suits *in rem* ownership is disregarded. The distinction between a suit *in personam* and one *in rem* is firmly established and the effort in the brief of counsel for the DuBois Company to break down this distinction is unavailing. It is not the law in this country that after the claimant of a vessel proceeded against has appeared, the suit continues as if originally begun *in personam*.

The English law was laid down by Sir Francis Jeune in the case of the *Englishman* and the *Australia*, L. R. [1894] Prob. Div., 239. There the steamship *Ada* collided with the tug *Englishman* towing the bark *Australia*. The Court found all three vessels in fault and held that the plaintiffs, the owners of the *Ada*, were entitled to recover one-half of their damages and that the tug and the bark were "primarily liable for a moiety of the sum recoverable with a remedy over against each in default of the other" (pp. 245-6).

The German law, like that of most continental countries, apportions damages according to the degree of fault. But where a collision occurred between a lighter in tow of a tug and a steamship, and the tug and tow were found equally in fault with the steamship, the Reichsgericht in Leipzig affirmed a decision which divided the damages so that the steamship bore one-half, and the tug and tow the other half jointly and severally.

The lighter *Unterweser 12,* tug *Blitz* and S. S. *Envoy*, Entscheidungen des Reichsgerichts in Civilsachen (14 Feb., 1903), LIV, p. 13. Also in the Hanseatische Gerichtszeitung (1903), Part I, p. 285, see Appendix.

III.—We respectfully submit that the questions certified should be answered by directing that the damages sustained by the carfloat be assessed upon the four vessels proceeded against equally, and that the DuBois Company recover one-half of its damages against the tugs Matthews and Moran, each of which should pay one-quarter.

Charles C. Burlingham,
Harrington Putnam,
Counsel for Moran.

APPENDIX.

[Extract from the *Hanseatische Gerichtszeitung* (1903) part I, p. 285.]

1—SCHLEPPSCHIFFAHRTS GESELLSCHAFT "UNTERWESER."

2—VEREINIGTE BUGSIR UND FRACHTSCHIFFAHRT GESELLSCHAFT

gegen

JOH. BERENBERG, GOSSLER & CO., ALS BÜRGEN FÜR BAILEY & LEETHAM, LTD., IN LONDON.

On January 14th, 1902, the lighter "Unterweser 12," belonging to the first libellant, which was in tow of the tug "Blitz," belonging to the second libellant, was run into by respondent's steamer "Envoy" in Kiel harbor at 3 A. M., all three ships suffering damage. On account of fog the lighter had dropped anchor, and the tug lay alongside her fastened to her starboard side.

On June 20, 1902, the Oberlandesgericht of Hamburg found all three vessels in fault, and held the tug and lighter jointly and severally liable to make good fifty per cent. of the damage sustained by the "Envoy."

* * * * * *

The Oberlandesgericht held that the "Envoy" was to blame because she had no proper watch; and that the lighter was to blame because she, a vessel more than 45 meters long, had only one anchor light, contrary to Art. II, Paragraph 2 of the Imperial Regulations.

That court continued:

"Both captains, however—that of the lighter as well as that of the tug—are to blame equally, in that they failed to exercise the precautions which were required by the circumstances; further in that, when—about one hour before the collision—the weather had cleared, and when they could see the lights, they remained at the anchorage which they had chosen during the fog without fault, but which then, it was easy to see, was just in the track of incoming steamers, since as the lighter did not have proper lights, both masters ought to have been aware that the negligence was increased by this position."

* * * * * *

"Nevertheless, the fault (even after the fog had lifted) to have remained lying there, applies to both captains equally, because it was the duty of each of them to do, what was required by nautical prudence in relation to the other, *i. e.*, to insist that they remove from that

place. Neither of them, therefore, had a right to shift upon the other the responsibility for having remained, unless the other had refused such a request—which, however, is not asserted by either party.

This common fault of both ships also shows that it would not be right to blame the lighter for the concurring fault in the collision damage to the "Envoy" because the lighter alone came in contact with the "Envoy." On the contrary, as both captains are responsible for the cause of the collision: *i. e.*, that the lighter lay there without proper lights, this concurring fault in the same degree likewise rests on the captain of the "Blitz." There is no recognizable difference between the degree of fault found on one side for the crew of the "Envoy" and on the other hand for the two captains of the lighter and the tug. Not to have an anchor-light required by law, and to remain without proper lights on an exposed anchorage, are not less blameable than to omit the diligence which is required in lookout. In both there is the same degree of fault. The fault and liability, therefore, must be equally halved.

"Dies führt zu dem Ergebniss, dass einerseits der Rheder des "Envoy" die Hälfte sowohl des dem Leichter als auch des dem Schlepper zugefügten Schadens zu tragen hat, während der Rheder des Leichters die andere Hälfte des seinem Fahrzeuge und ebenso der Rheder des 'Blitz' die Hälfte des diesem Schiffe zugefügten Schadens trägt, und dass andererseits diese beiden Rheder solidarisch für die Hälfte des Schadens, der dem 'Envoy' enstanden ist, zu haften haben, während der Rheder des 'Envoy' für die andere Hälfte diese Schadens selbst einstehen muss.

Dies Urtheil wurde am 14 Februar 1903 vom R. G. (I 327/02) bestätigt."

"This produces the result that on the one side, the owner of the 'Envoy,' has to bear the half of the damages caused to the lighter as well as to the tug; while the owner of the lighter the other half of the damage caused to his vessel; and the owner of the 'Blitz' bears the half of the damage caused to this vessel. On the other hand, these two owners are liable jointly and severally for half of the damage caused to the 'Envoy,' while the owner of the 'Envoy' has to bear himself the other half of this damage.

This decision was affirmed by the Reichsgericht [at Leipsic] (1 327/02) on the 14th February, 1903."

Also reported in the decisions of the Reichsgericht in Civil Matters, vol. 54, p. 13.

UNITED STATES SUPREME COURT.

The Steamtug *Eugene F. Moran*, MICHAEL MORAN, claimant, and Scows *15 D* and *18 D*, HENRY DUBOIS' SONS COMPANY, claimant,

against

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, and the Steamtug *Charles E. Matthews*, JOHN D. DALY *et al.*, claimants.

No. 87.
October Term, 1907.

The Steamtug *Eugene F. Moran*, MICHAEL MORAN, claimant, and the Steamtug *Charles E. Matthews*, JOHN D. DALY *et al.*, claimants,

against

HENRY DUBOIS' SONS COMPANY.

No. 88.
October Term, 1907.

BRIEF ON BEHALF OF THE CLAIMANTS OF THE TUG *CHARLES E. MATTHEWS.*

Statement.

These two cases, tried together in the United States District Court for the Southern District of New York, come to this Court on certificates from the United States

Circuit Court of Appeals for the Second Circuit, asking for instructions as to how the damages shall be apportioned.

In the first case, the New York Central and Hudson River Railroad Company sued the tugs *Eugene F. Moran* and *Charles E. Matthews*, and the scows *15 D* and *18 D* for damages sustained by its carfloat by reason of a collision between the carfloat and scow *15 D*.

The carfloat was in tow alongside of the tug *Charles E. Matthews*, and was free from fault, unless, contrary to *Sturgis* vs. *Boyer*, 24 How., 110, she should be held responsible for the faults of the tug *Matthews*.

The tug *Matthews* was guilty of faults that contributed to the collision.

Both the scows and the *Moran* were guilty of a common fault contributing to the accident—*i. e.*, the failure of the scows to display the required lights.

The *Moran* was guilty of other faults contributing to the collision.

In the second case, the Henry DuBois' Sons Company, as owner of the scow *15 D*, sued the tugs *Eugene F. Moran* and *Charles E. Matthews* for the damages sustained by the *15 D* by reason of the collision between it and the carfloat in tow of the *Matthews*.

The *Matthews* was guilty of faults which contributed to the collision.

Besides the scow *15 D* there was also in tow of the *Moran* the scow *18 D*, belonging to the owner of the scow *15 D*.

Both of these scows and the *Moran* were guilty of a common fault contributing to the accident—namely, the failure of the scows to display the required lights.

The *Moran* was guilty of other faults contributing to the collision.

The Apportionment of the Damages by the District Court.

In the first case the District Court found that all four vessels having been at fault, the damages sustained by the New York Central carfloat should be borne equally by each of the four vessels.

In the second case, the District Court held that the scow *18 D* having been also at fault, and belonging to the owner of the scow *15 D*, the libellant could recover only one-half of his damages from the *Matthews* and the *Moran*, that one-half to be borne equally by those two vessels.

FIRST POINT.

The District Court correctly apportioned the damages to the carfloat equally among the four vessels sued.

In admiralty the number of owners or the number of agents or servants of owners who are involved in a fault contributing to a collision should have no effect upon the apportionment of the damages. In actions *in rem* what the admiralty looks to is the *res*. The rule was long ago established that the admiralty law decrees the payment of damages against the offending thing and not against the owner.

Nor does admiralty consider the number or gravity of the faults of each vessel.

The only logical method of apportioning the damages, where the rule of comparative damage does not obtain, is that adopted by the District Court in apportioning the damages to the carfloat—*i. e.*, to apportion the damages among the offending vessels without any consideration

whatever being given to ownership or the number of servants or agents of owners.

It was contended below that the most logical method of apportionment in such cases as these is to consider the tug and her tow as one vessel.

While a tug and her tow may properly be considered as one vessel for many purposes, they should not be so considered in apportioning the damages.

The Court certifying this question held in *The W. G. Mason*, 142 Fed. Rep., 913, that a tug and her tow are not one vessel for the purpose of ascertaining their relations as between themselves, or their several liabilities to respond for the consequences of a fault of one of them.

And this Court held in *The Juniata*, 93 U. S., at page 340, that apportionment has no application where the tow is not at fault.

If the tug and tow are to be considered as a common entity for the purposes of apportionment, then *Sturgis* vs. *Boyer*, 24 How., 110, should be overruled.

If it is overruled, then there is no reason why the tow should not contribute for the fault of her tug, although the tow itself may not be at fault.

Thus in this case the carfloat, under the doctrine of common entity, should contribute for the *Matthews'* fault.

What would be the result of overruling *Sturgis* vs. *Boyer*, and establishing the rule of common entity?

A ship worth say $100,000 is being towed by a tug worth $10,000. A collision occurs, due solely to the fault of the tug, between the ship and another vessel, whereby the latter vessel is damaged to the extent of say $50,000. The tug limits her liability to $10,000. The doctrine of common entity and the overruling of *Sturgis* vs. *Boyer* would mean that the innocent ship must pay the remaining damages, although she in no wise contributed to the collision.

There is no more reason why such a rule should obtain

in admiralty than that there should obtain at common law a rule that a man hiring an automobile for an hour's ride from a cab company is liable for a personal injury resulting from the negligence of the chauffeur, a servant of the cab company.

It has been argued that the decisions of this Court in *The China*, 7 Wall., 53, and *The Barnstable*, 181 U. S., 464, are not consonant with the decision in *Sturgis* vs. *Boyer;* but we think those two cases are easily distinguishable.

In those cases the *res* were found at fault. It is true that such faults were consequent upon the acts of those on board or in charge of the vessels; for of course a vessel cannot itself be guilty of fault. But in the case of a tow, the tow is, so to speak, merely a club in the hands of the tug, and if those on her do nothing wrong she is free from fault notwithstanding her tug may be at fault; the tug, being the controlling influence, is the thing that offends.

The doctrine of common entity of tug and tow can be sustained only on the theory that the owner of the vessel, having given charge of her over to the tug, has made the vessel towed a part of a common operation, so that she should be liable not only for her own faults, but those of the tug; although the rule in this country (differing from that in England) is that the tug is not the servant of the vessel towed, that is, unless the control of the tug is in the vessel towed, which is rarely the case in this country.

If the doctrine of common entity of tug and tow is to be sustained, then why not carry the doctrine further, and make cargo and ship a common entity for all purposes? The same reasoning that would make a tug and tow a common entity would make cargo and ship one.

We think, then, the correct rule of apportionment is to consider only the offending *res* before the Court. If there are three offending *res*, then the damages should be

divided into thirds. If there are four offending *res*, then the damages should be divided into fourths; and so on, no matter what may be the number of guilty *res*.

This, of course, may work an apparent hardship if more than one of the offending *res* belongs to the same owner; but then that owner has had more than one offending thing which has contributed to the damage, and the damage might have been less, or might not have happened at all, had not *each of his vessels* been guilty of fault.

The moment any consideration of ownership or of a common or similar fault is allowed to enter into the apportionment of the damages, infinite difficulties will arise.

It is a matter of common knowledge that there are many vessels which are owned in part by a number of persons. Take a simple collision between two vessels. The same person owns say a three-fourths part in one vessel and a one-fourth part in the other. If ownership is to be considered in apportioning the damages, how would they be apportioned in such a case?

Again, take a case where a tug and the boats in her tow are owned in part by several owners. Suppose the tug has two part owners, and one of them is a part owner of one of the guilty boats of the tow. How, then, would the damages be divided?

Suppose that in this case the carfloat were partly owned by the owner of the tug *Matthews*. Would that make the carfloat liable for part of the damages?

The rule of division of damages has been called a *judicium rusticorum* (Dr. Lushington, in *The Milan*, Lush., at p. 402); and a modern writer on admiralty, in considering the subject, has said:

> "The reason given by Dr. Lushington for an equal division, even where the fault is unequal (*The Milan*, Lush., 388), is the impossibility of apportioning accurately under such circumstances, and the uncertainty which it would introduce into litigation. No

two judges might agree as to the exact proportions to be made, and it would be impossible for counsel in any collision case to advise with any degree of accuracy."

Hughes on Admiralty, 1st Ed., p. 277

The same objection applies to any consideration of ownership or of common or similar fault entering into the question of the apportionment of damages.

And the same writer, in considering the origin of the rule of division of damages, has said:

"An examination of these old codes reveals another very important fact in relation to it, and that is that it originated, not in the law of torts, but in the law of average. It is under that head in the Ordonnance of Louis XIV., and the language of the others shows that it was treated as a *contribution* [italics ours], and not as a mere liability on the ground of tort."

Hughes on Admiralty, p. 276.

The view that the origin of the rule of division of damages was in the law of average, and that all the offending *res* should contribute equally, is, we think, sustained by the decision of this Court in *The North Star*, 106 U. S., 17. The Court, speaking by Mr. Justice Bradley, said at p. 20:

"On the contrary, the almost invariable mode of statement is, that the joint damage is equally divided between the parties; or, (as in some authorities) *it is spoken of as a case of average.*" (Italics ours.)

The rule of division of the damage does not, therefore, contemplate simply that the damages shall be divided into two equal parts, or that the libellant, having contributed to the accident, can recover only one-half of his damages, but what that rule means is that each and every guilty thing (not every owner) contributing to the damage shall stand its share of the loss.

We submit that the only sensible and logical way in which damages can be apportioned, where more than two vessels are at fault, is to follow the analogy of the rule of division of damages and apportion the damages equally among the offending *res* that are before the Court, thus making all *contribute* to a damage that has been contributed to by faults on the part of all.

Any other rule leads, like the rule of comparative damage, to infinite complications.

In this case there were four offending *res* before the Court—namely, scows *15 D* and *18 D*, and the tugs *Moran* and *Matthews*. The scows *15 D* and *18 D* contributed to the collision, because neither of them had lights. The *Moran* was at fault, because she did not see that the scows had their lights burning, and also in other respects; and the *Matthews* contributed because she kept on at full speed after the *Moran* did not answer her signal. Had any one of these vessels not been guilty of fault, the collision might not have happened.

All having contributed, and all the offending *res* having been before the Court, we think the District Judge divided the damages in the only logical and sensible way, and that his apportionment is sustained by the best considered cases.

The Brothers, 2 Biss., 104.
The Peshtigo, 25 Fed. Rep., 488.
The Doris Eckhoff, 41 Fed. Rep., 156.
The Lyndhurst, 92 Fed. Rep., 681.
The Nettie L. Tice, 110 Fed. Rep., 461.
The Maling, 110 Fed. Rep., 227.
The S. A. McCaulley, 116 Fed. Rep., 107.

SECOND POINT.

The damages in the second case were also correctly apportioned.

In the second case the Henry DuBois' Sons Company, owner of the scow *15 D*, sued the tugs *Matthews* and *Moran* for the damages sustained by that scow. The parties before the Court were then the Henry DuBois' Sons Company, libellant, and the tugs *Matthews* and *Moran*.

The Scow *18 D* was not brought in by petition, but it clearly appeared from the proof that that scow was owned by the Henry DuBois' Sons Company.

The District Judge, having found all four vessels at fault, directed that the libellant recover one-half of its damages, the recovery to be borne equally by each of the tugs.

This division, we think, was correct.

It may be urged that our position with reference to the apportionment in the second case is inconsistent with our contention that damages should be apportioned among the offending *res* without reference to ownership, and, as in this case the Scow *18 D* was not brought in by petition, the damages should be apportioned in thirds.

But we think that the District Judge's apportionment in this case can be explained and sustained in the following way:

It is true that the Scow *18 D* was not brought in by petition, and therefore, technically, was not before the Court. It is also true that, technically, the Scow *18 D* should have been brought before the Court if the *Matthews* and the *Moran* wished her to bear part of the damages in this action; and this clearly would have had to have been done had she belonged to parties other than the owner of Scow *15 D*. But, it being admitted that Scow *18 D* belongs to the owner of Scow *15 D*,

the District Court had a right to make such a decree as it did in order to avoid a multiplicity of suits.

Thus, suppose the damages had been apportioned in thirds on the theory that the only offending *res* before the Court were Scow *15 D*, the *Matthews* and the *Moran;* such an apportionment and a final decree on that basis would not prevent the *Matthews* and the *Moran* from bringing an action for contribution against the Scow *18 D*. And if such an action were brought, it is clear that the *Matthews* and the *Moran* could make the Scow *18 D*, and therefore her owner, contribute for her share of the damages.

The Mariska, 107 Fed. Rep,, 989.
Erie Railroad Co. vs. *Erie Transp. Co.*, 204 U. S., 220.

This being true, there is no reason why the District Judge should not have apportioned the damages as he did, *i. e.*, make the owner of Scow *18 D* stand her portion of the damages without forcing the *Matthews* and the *Moran* to the expense of a separate action to enforce contribution.

THIRD POINT.

The answer to the questions certified should be in each case that the District Court correctly apportioned the damages in each of the two cases.

Respectfully submitted,
GEO. H. EMERSON,
Proctor for Claimant
Of tug *Charles E. Matthews*.

WM. S. MONTGOMERY,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1908.

No. 87.

THE STEAMTUG "EUGENE F. MORAN," MICHAEL MORAN, CLAIMANT, AND THE SCOWS "15-D" AND "18-D," THE HENRY DUBOIS SONS, CO., CLAIMANT,

vs.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY AND THE STEAMTUG "CHARLES E. MATTHEWS," JOHN D. DAILEY ET AL., CLAIMANTS.

No. 88.

THE HENRY DUBOIS SONS CO. AND THE STEAMTUG "EUGENE F. MORAN," MICHAEL MORAN, CLAIMANT,

vs.

THE STEAMTUG "CHARLES E. MATTHEWS," JOHN D. DAILEY ET AL., CLAIMANTS.

BRIEF FOR THE HENRY DUBOIS SONS CO.

OWNER OF SCOWS "15-D" AND "18-D."

JAMES EMERSON CARPENTER,
SAMUEL PARK,
JAMES KEITH SYMMERS,
Proctors for HENRY DUBOIS SONS CO.

JAMES EMERSON CARPENTER,
Of Counsel.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1908.

The steamtug "EUGENE F. MORAN," MICHAEL MORAN, claimant, and the scows "15-D" and "18-D," the HENRY DUBOIS SONS CO., claimant, vs. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY and the steamtug "CHARLES E. MATTHEWS," JOHN D. DAILEY *et al.*, claimants.	No. 87.
THE HENRY DUBOIS SONS CO. and the steamtug "EUGENE F. MORAN," MICHAEL MORAN, claimant, vs. The steamtug "CHARLES E. MATTHEWS," JOHN D. DAILEY *et al.*, claimants.	No. 88.

BRIEF FOR THE HENRY DuBOIS SONS CO.

On Certificate from the United States Circuit Court of Appeals for the Second Circuit.

Statement of Facts.

The facts briefly stated are:

At about 7.30 P. M. on February 1, 1905, the scow *15-D* while in tow of the steamtug *Eugene F. Moran*,

bound south, was damaged in collision with a carfloat in tow of the steamtug *Charles E. Matthews*, bound north, in the Hudson River. The *15-D* was owned by the Henry DuBois Sons Company. She was on a hawser immediately behind the *Moran*, and said scow *15-D* was followed by scow *18-D*, also owned by the Henry DuBois Sons Company, on another hawser.

A libel *in rem* was filed in the United States District Court for the Southern District of New York in Admiralty by the Henry DuBois Sons Company, owner of the injured scow *15-D*, against the steamtug *Eugene F. Moran* and the steamtug *Charles E. Matthews* to recover the damages growing out of the injuries to scow *15-D*. The owners of the respective steamtugs appeared in said suit and entered into the usual stipulations for costs and for value. Neither the carfloat nor the scow *18-D* was made a party or brought in by petition under the 59th Rule.

The New York Central and Hudson River Railroad Company, as owner of the carfloat, also filed its libel *in rem* in the United States District Court for the Southern District of New York, in Admiralty, against the steamtug *Charles E. Matthews* and the steamtug *Eugene F. Moran* and the scows *15-D* and *18-D*. The owners of the scows and the respective steamtugs duly appeared and entered into the usual stipulations for costs and value.

The two suits were not consolidated, but for convenience were tried at the same time and it was adjudged, as stated in the certificate to this Court, that the carfloat was not guilty of any fault in her own management, and "that the tug *Matthews* was guilty of faults of navigation which contributed to the accident. Neither the scow *15-D* nor the scow *18-D* displayed the lights required by the rules of navigation. There was an employee of the owner in charge of each scow, and it was their duty, as well as the duty of the master of the tug (the *Moran*), to have the lights put up. Both scows, therefore, and the *Moran* were guilty of a common fault contributing to the accident. Besides, the

Moran was guilty of other faults of navigation also contributing to the accident."

The District Judge decided the cause as to respective faults orally at the close of the trial, and subsequently filed an opinion as to obligation to put up lights and apportionment of damages, which will be found reported in 143 F. R., 187.

In its opinion the Circuit Court of Appeals says:

> "Interesting questions are presented as
> " to the damages. In the first suit (the
> " suit of Henry DuBois Sons Company
> " against the tugs *Matthews* and *Moran*) one-
> " half of the damage to *15-D* was assessed
> " in equal proportions against the *Matthews*
> " and *Moran*. In the second suit the dam-
> " ages to the carfloat were assessed in equal
> " proportions against the *Matthews*, the
> " *Moran*, scow *15-D* and scow *18-D*. In the
> " up-going flotilla, the *Matthews*, not owned
> " by the damaged car-float, was in fault; in
> " the other flotilla, the damaged scow *15-D*
> " and her companion scow, owned by the
> " same party, and the *Moran* owned by
> " another claimant were all in fault. Under
> " these circumstances shall the damages be
> " assessed in equal proportions among the
> " four offending vessels, or shall the two
> " scows be considered a single vessel and
> " damages assessed in thirds, or shall dam-
> " ages be first assessed equally between the
> " two flotillas, and the half assessed on the
> " south bound flotilla be charged in thirds
> " against each vessel composing it or half
> " against the *Moran* and half against the two
> " scows?"

It will be noticed that in case No. 87 the four vessels found in fault are all before the Court; in No. 88, the owner of the two scows, as libellant, proceeds against the two tugs for the damage to *15-D*.

FIRST POINT.

An equitable solution of the problem would be to treat the libellant and the respective claimants as the real parties and to divide the damages equally among the owners of the various vessels at fault irrespective of the form of the action.

In the alternative the tug and tow should be deemed a single vessel, and where the tug and tow are jointly in fault the damages should be divided equally between the tug and tow and a third vessel also in fault, and as between the tug and its tow the moiety should be borne by the owners of the tug and tow respectively in equal parts, subject to the rule laid down in the *Alabama* and the *Gamecock*, 92 U. S. 695.

FIRST.—In the apportionment of damages in admiralty the fundamental equitable principle is to equalize the burden among those who should bear it.

The North Star, 106 U. S., p. 17.
Atlee v. *Packet Co.*, 21 Wall, p. 389.

While not possessing the general powers of a court of equity, yet a court of admiralty decides matters before it upon principles of equity.

U. S. v. *Cornell St. Bt. Co.*, 202 U. S., p. 184.
The Max Morris, 137 U. S., p. 1.

In the case of *Sturgis* v. *Boyer*, 24 How., 110, the Court says (pp. 121, 122):

"Cases arise, undoubtedly, when both the "tow and the tug are jointly liable for the con-

"sequences of a collision; as when those in "charge of the respective vessels jointly "participate in their control and manage- "ment, and the master or crew of both ves- "sels are either deficient in skill, omit to take "due care or are guilty of negligence in their "navigation."

See also the *Mabey* and *Cooper*, 14 Wall., 204, and the *Virginia Ehrman* and the *Agnese*, 97 U. S., pp. 309, 313.

In the Henry DuBois Sons Company *v.* the *Charles E. Matthews* the question certified is as follows:

In what proportion should the damages of the libellant be assessed upon the offending vessels?

In the case of the New York Central, etc., *v.* the *Moran*, the *Matthews*, and the scows *15-D* and *18-D*, the question certified is:

In what proportion should the damages of the carfloat be assessed upon the offending vessels?

In its opinion the Circuit Court of Appeals asks:

1. Shall the damages be assessed in equal proportions among the four offending vessels?

2. Shall the two scows be considered a single vessel and damages assessed in thirds?

3. Shall damages be first assessed equally between the two flotillas and the half assessed on the southbound flotilla be charged in thirds against each vessel composing it, or half against the *Moran* and half against the two scows?

In the suit of the Henry DuBois Sons Co. against the *Matthews* and the *Moran* there are three parties before the Court, to wit, the owner of the damaged scow *15-D* and the owners respectively of the steamtugs *Matthews* and *Moran*, or the libellant and the two vessels libeled.

In the suit of the New York Central and Hudson River Railroad Company there are four parties before the Court, to wit, the owner of the carfloat (the libellant), and the owners respectively of the two scows *15-D* and *18-D* and of the tugs *Matthews* and *Moran*.

In respect of the suit of the Henry DuBois Sons Company against the *Matthews* and the *Moran* we submit that the answer to the question first above propounded by the Circuit Court of Appeals in its opinion must be in the negative, for whether the damages be apportioned upon the doctrine of the "offending thing," or as *in personam* between the owners of the respective vessels, the result will be the same. It appears from the certificate that the scow *18-D* was not made a party to the suit, nor brought in by petition under the 59th Rule.

> "Co-wrongdoers, not parties to the suit,
> "cannot be decreed to pay any portion of
> "the damage adjudged to libellant, nor is it
> "a question in this case whether the parties
> "served may have process to compel the
> "other wrongdoers to appear and respond to
> "the alleged wrongful act."
>
> *The New York*, 175 U. S., p. 187, on p. 210.

In the first above-entitled suit the same rule may well apply, for after the respective claimants had appeared and bonded their vessels the only parties really before the Court were the owners of each of the tugs and the tow, for none of these boats can be heard in this Court or elsewhere save through its owner or claimant, and the suit *in rem* is simply a ready and effectual means of compelling the wrongdoer to appear and defend the action, or to make recompense.

> The steamboat "Burns," 9 Wall. 237, 239.
>
> The City of Norwich, 118 U. S., p. 468, at p. 503.
>
> The Atlas, 93 U. S., pp. 302, 311.
>
> Marsden's Coll. (5th Ed., 1904), pp. 69–72.

Considered, after the owners have appeared and filed stipulations and vessel released, as still a proceeding *in rem*, no decree in suit No. 85 can be rendered against the *18-D*. Considered as a suit *in personam* without regard to the *res* all of the parties having been found in fault the damages sustained by the libellant should be divided equally between the three several parties.

In the case of the arrest of property in the admiralty if the owners do not appear the judgment is limited to the *res* in the custody of the Court, but if they appear and give bail the lien is discharged, the vessel released and they are in the same position as if they had been brought before the Court by personal notice.

The Dictator, P. D. 1892, p. 304.
The Gemma, 8 Asp. Mar. Cas., N. S., p. 585.
The Euripides, 71 Fed., 728, 729.

In *In re Norwich and New York Transportation Co.*, 17 Blatch., at p. 237, Mr. Justice Strong (1879) says:

> "A suit *in rem* is, in a very proper sense, a "suit against the owner of the thing * * * "and especially is this true when, as in the "present case, the owner appears in the suit "and claims the thing attached."

Mr. Waples, in his learned treatise on Proceedings *in Rem*, p. 134, says:

> "Suits *in rem* are not only against a thing "but also against 'all persons having or pre- "tending to have any right, title or interest "in or to' that thing. They are, in a sense, "always personal actions, since all persons

"are notified and all affected by the judg-
"ment."

And see *Boyd* v. *United States*, 116 U. S. 616, 637, 638.

Windsor v. *McVeigh*, 93 U. S., 274, at p. 277 *et seq.*

U. S. v. *422 Casks of Wine*, 1 Peters, 547 (Story, *J.*).

In the case of the *Gemma* (*supra*), Smith, *L. J.*, says (pp. 587, 588):

"I would point out that if the defendants
"had not appeared, and the proceedings had
"throughout been solely *in rem*, the judg-
"ment or decree, according to the practice
"of the Admiralty Court, would have been
"not, as in the present case, condemning the
"defendants in damages and costs, but would
"have condemned the ship alone.

"Now, apart from authority, it appears to
"me that when a person whose ship has been
"arrested by the Marshal of the Admiralty
"Court thinks fit to appear and fight out his
"liability before the court, the forms of pro-
"ceedings in the Admiralty Court show—and
"it is not disputed that the forms I have men-
"tioned are those which have been in use, ac-
"cording to the practice of the court from
"olden times—that the persons appearing as
"defendants have in the present case become
"parties to the action, and thereby become per-
"sonally liable to pay whatever in the result
"may be decreed against them; and the action,
"though originally commenced *in rem*,
"becomes a personal action against the de-
"fendants on appearance. For what pur-
"pose does the defendant appear to an action
"*in rem*? There are, as it seems to me,
"three reasons: First, to release the ship so
"that it may go on trading for the owner;
"secondly, to test the plaintiff's allegations
"that the ship had been in default; and,
"thirdly, in order to prevent its being sold.
"The President, in a judgment full of learn-
"ing and research, in which he has dealt
"with all the cases from the earliest times,

" whether in conflict or not, has held in the
" case of the *Dictator* (*ubi sup*) that a person
" appearing in an action *in rem* becomes per-
" sonally liable, and considering that no real
" argument was addressed to us to impeach
" this judgment, and having considered it
" and the principles appertaining to the pres-
" ent case, I do not doubt that the President
" came to the correct conclusion, and I adopt
" it."

As the owners of a ship are not liable, under our existing laws, for any loss, damage or injury by collision, occasioned without their privity or knowledge, beyond the amount of their interest in such ship and her freight at the time the collision occurred, such personal judgment would be limited in amount to such value.

After seizure and service of monition by the marshal in a proceeding *in rem*, and after the appearance of the owner of the ship in the suit, the Court having jurisdiction of the parties, we do not see why judgment should not go against the person so appearing and contesting the suit, *in personam*. As was said in the *Dictator, supra*, at p. 257, the only result of refusal would be to drive the plaintiff to bring another action.

Nor would such a personal judgment we think be any violation of Admiralty Rule 15. The suit was originally commenced against the vessel. If the owner voluntarily appears and submits himself to the jurisdiction, contests the liability of the ship, which is his own liability, we see no substantial reason why a final decree against him for the payment of the damages should not be made, to be enforced as provided in Admiralty Rule 21. See 2 Conkling's Ad. (2nd Ed.), pp. 432-434.

In the case of the *Monte A.* 12 Fed. Rep. p. 331, the Court held that a general appearance in an action *in rem* is limited by the nature of the action and the property seized. Some of the English cases relied upon by the Court in rendering its opinion are referred to in the decision in the case of the *Dictator*,

(*supra*,) and we think the conclusion of the Court in the latter case more consistent with logic and reason.

In the case of the New York Central, owner of the carfloat, no fault having been found on the part of the carfloat, she was properly exonerated under the rule laid down in Sturgis *v.* Boyer, *supra*, thus leaving the two scows and the two steamtugs, or their respective owners, to respond for the injuries sustained by the carfloat in collision.

We submit that the true rule is as stated in *Sturgis* v. *Boyer*, *supra*, and in the *Clarita*, 23 Wall., 11.

Were our law otherwise, vessels would be liable *in rem* for damage done by them while being towed, irrespective of the question of their negligence, and for damage done by them through the malicious torts of trespassers temporarily in unlawful and unauthorized possession or control, and the New York Central & H. R. R. R. Co., owner of the carfloat in tow of the tug *Matthews*, would also be held in fault.

The rule of *Sturgis* v. *Boyer* and the *Clarita* is recognized by text-writers as elementary. Under it the scows in this case are held at fault, if at all, because of the negligence of the masters of the scows in failing to maintain lights. This negligence is the negligence of the owners of the scow because, as stated in the *Clarita*, the masters were employed by the owner—were its agents and servants. The owner's fault is neither to be increased nor diminished by any consideration of the number of employees guilty of the negligence which is imputed to the owner. Were it otherwise it would in some cases reduce itself to an absurdity.

The *Matthews*, *Moran* and scow *15-D* respectively having been held in fault the damage may be divided into thirds, the owner of the *15-D* paying one-third of the damages arising from injuries to the car-float, and losing one-third of the damages arising from injuries to the scow *No. 15-D*.

Considering, however, in the case of the Henry Du Bois Co. the vessel actually in collision, that is, the scow *15-D* as an "offending" or "guilty thing," justice would seem to require that the owners of the respective tugs and of the damaged scow *15-D* should share equally, all having been found in fault. It would certainly not seem just if, because the owner should happen to own the "offending thing" in the tow, and happen to own other vessels in the same flotilla in tow, he must have his right of recovery cut down in proportion to the number of vessels in the flotilla owned by him. It seems to us that an opposite contention leads to a *reductio ad absurdum*. Supposing in this case, instead of two scows, the libellant, the Henry DuBois Sons Company, had had twenty scows in tow of the *Moran*, all of them without lights, would the Henry DuBois Sons Company, as libellant in the second above-entitled cause, have recovered only one-eleventh of its damages, and as claimant in the other cause have been compelled to pay ten-elevenths of the damages to the New York Central car-float?

In answer to the second question propounded by the Circuit Court of Appeals in its opinion, we think that justice would require that the two scows guilty of the common fault be considered a single vessel, or, in other words, that in apportioning the damages each of the tugs and the tow, no matter of how many vessels the latter may consist, be regarded respectively as separate entities.

On the seaboard, the Great Lakes and the inland rivers much of the business is done by the towing of scows, barges and other craft without propelling power of their own. Whether the tow is made up of one or thirty or more of these vessels, as is sometimes the case comprising a flotilla, all fastened together, they are spoken of as the tow. The tug and tow, the latter called the tow without regard to the number of boats composing it. Applying the principles of the case of the *Lyndhurst*, *supra*, each damaged vessel in the tow will recover its propor

tion where a tug, tow and third vessel are in fault without regard to the number of other vessels contained in the flotilla in tow, or their ownership, all guilty of a common fault.

In suit No. 88 the Court has found the *Matthews*, the *Moran* and the damaged scow *15-D* in fault for the collision, and we see no reason why the rule of dividing the loss in thirds should not be applied between the two guilty tugs and the damaged scow, notwithstanding there was another boat or boats in the tow equally guilty of fault, but not sued, unless in case the tug and the tow are to be deemed a single vessel, when a different rule of apportionment would obtain, which we shall now consider.

SECOND.—It has been held in cases like those at bar that the tug *Moran* and scows for purposes of navigation with reference to other vessels are to be regarded as a single vessel.

N. Y. & Blt. Trans. Co. v. *The Philadelphia & Savannah Steam Nav. Co.*, 22 How., 461.

The Ivanhoe, 7 Ben., 213 Fed. Cas., 7113.

The Civilta and the *Restless*, 13 Otto, 699.

The Gladys, 144 Fed., 653, 655.

There is a joint liability of the tug and tow for their joint negligence.

It has also been held that where the tug and tow are jointly liable to a third ship the owners of the latter may sue either or both, but that a right of apportionment lies between a tug and tow.

The Atlas, 3 Otto, 302.

The Court will not hold the tug and tow jointly liable unless there is fault in both.

The John Frazer, 21 How., 184.

The Civilta and the *Restless*, 13 Otto, 699.

The Express, 52 Fed., 890, 892.
Sturgis v. *Boyer*, 24 How., 110.
The Clarita and the *Clara* (1874), 23 Wall., 1, 11.

And where both tug and tow are held jointly liable the damages are to be divided between them subject to the rule laid down in the case of the *Alabama* and the *Gamecock*, 92 U. S., 695.

There is also authority both in this country and in England that where both tug and tow and a third ship are to blame for a collision between the tug or tow and a third ship the tug and the tow will be considered as one vessel and contribute together one-half, the remaining half to be borne by the third vessel.

The Englishman and the *Australia* (L. R., 1894), P. D., 239.
The Komuk (D. C. S. D. of N. Y., 1903), 120 Fed., 841.
The Merrill C. Hart, the *A. C. Cheney* and the *Seminole* (D. C. S. D. of N. Y., 1908), 162 Fed., 371.
The Fred. W. Chase (D. C. D. of S. C., 1887), 31 Fed., p. 91.

In the case of the *Englishman* and the *Australia* (*supra*) the steamship *Ada* was in collision in the North Sea with the steamtug *Englishman* towing the barque *Australia*. The *Ada* sank and the *Englishman* sustained damage. The Court found all three vessels to blame, the *Ada* for going at about six knots an hour in the fog; the tug *Englishman* also for excessive speed and the *Australia* for not controlling the speed of the tug. It was *held* that the owners of the tug and the owners of the tow were liable for half the damages of the third vessel after deducting half the damages of the tug for which the owners of the third vessel were liable.

The decree condemned the owners of the *Englishman* and the barque *Australia* in a moiety of the plaintiff's claim in respect of damage and condemned the owners of the *Ada* in a moiety of the counterclaim of the owners of the *Englishman*.

The case of the *Komuk* (*supra*) was a case of collision between the steam-lighter *Clarence* and the canalboat *E. W. Griggs* in tow of the *Komuk* on a hawser, and all three vessels were held in fault. The tug *Komuk* and her tow, the *E. W. Griggs*, were held in fault because the latter did not display lights. The Court said (p. 342):

> "They (the tug and tow) will be considered
> "as one vessel and contribute together one-
> "half. The remaining half will be borne by
> "the *Clarence*" (citing the *Lyndhurst*, D. C., 92 Fed., 681; *The Nettie L. Tice*, D. C., 110 Fed., 461).

The case of the *Merrill C. Hart et al.* (*supra*) was a collision between the yacht *Seminole* and the schooner *Hart* in tow of the tug *A. C. Cheney*. All the vessels were held in fault. The Court said (p. 379):

> "The *Seminole* will be held for one half
> "the damages and the tug and schooner will
> "be considered as one vessel and liable for
> "the other half."

The *Fred W. Chase* (*supra*) was a case of collision between a schooner in tow of the steamtug *Fred W. Chase* and steamer *City of Atlanta*. The steamer was held in fault and also the steamtug and schooner. The Court held that the tug and tow were in law one vessel, and divided the loss between the tug and the tow on the one side and the steamer on the other.

In its opinion the United States Circuit Court of Appeals says:

"The authorities are not all in accord."

The Komuk (120 Fed. R., 841).
The Niobe (13 P. D., 55; 1891, App. Cas., 401).
The Brothers (2 Biss., 104).
The Nettie L. Tice (110 F. R., 461).
The Express (44 F. R., 392; 46 F. R., 860; 52 F. R., 890).
The Peshtigo (25 F. R., 488).
The Lyndhurst (92 F. R., 681).
The Anerly (58 F. R., 794).

We beg to call the attention of the Court to the cases, referred to in the opinion of the Court of Appeals, not already mentioned.

The case of the *Niobe* was a case of collision between the tug *Flying Serpent* and the steamship *Valetta*. The tug had the *Niobe* in tow. The fault of the tug was not contested. The *Niobe* was also held in fault. It was held in the House of Lords that the tow and tug were one ship in contemplation of law for all purposes of their joint navigation, and that that principle applied so as to make the underwriters under a policy, which in terms dealt with the insured ship coming into a collision, liable in respect of a collision between her tug and another vessel.

The case of the *Brothers*, 2 Biss. 104; Fed. Case No. 1969, was a case where a tug and her tow consisting of one vessel were held in fault together with a third vessel for collision. The resultant damage was divided equally between all the vessels. This case was affirmed on appeal in Maxwell *v.* the *Brothers* and the *Lady Franklin*, Fed. Case No. 9322.

Mr. Justice Davis, sitting in Circuit, said:

> "But, it is said, if the *Franklin* was in "fault, the Court erred in the rule of assess-

" ment of damages. This may, or may not,
" be true; but, if true, the error is in favor
" of the *Franklin*, of which she cannot com-
" plain.

" The only serious question in this case is,
" whether the *Franklin* should not have been
" made to pay one-half of the loss."

In the case of the *Nettie L. Tice* (1901) 110 Fed. 461, it was held that where a canalboat, being towed alongside a tug at night in a harbor, failed to display a white light on her outboard bow as required by Inspector's Rule 11, both the tug and the canalboat were chargeable with the fault. The fire boat, *Zophar Mills*, which collided with the canalboat and did the injury, was also held in fault, and it was held that the libellant, the owner of the canalboat, was entitled to a decree for two-thirds of the damages and costs, and that the *Zophar Mills* and the tug *Nettie L. Tice* should as between themselves each bear one-third of the damages.

In the *Express*, 44 F. R., 392; 46 F. R., 860; 52 Fed., 890, 894 (Circuit Court of Appeals, Second Circuit, 1892), suit arose out of a collision between the steamer *Express* and the steamship *Niagara*, the latter being at the time in tow of steamtugs, the *Charm* and the *Starbuck*, these two tugs being the property of the same owner. Libel was filed by the owners of the *Niagara* against the *Express*, and on the petition of the owner of the *Express* the two tugs were also brought in as respondents. A libel was also filed by the owner of the *Express* against the *Niagara* and the two tugs. The District Court dismissed the libel against the *Express* and decreed in favor of her owner against the *Niagara* and the two tugs, and in favor of the owner of the *Niagara* for half her damages against the two tugs, adjudging that the *Niagara* and both tugs were in fault for the collision, and that the *Express* was not in fault. The Court, speaking by Wallace *J.*, affirmed the

decrees, holding that they properly apportioned the damages for the injuries of the *Express* between the *Niagara* and the tugs, and divided the damages sustained by the *Niagara* between that vessel and the two tugs.

In the case of the *Peshtigo* (25 Fed., 488), it would seem that of the two vessels in tow the one which actually did the damage, and which might be said to be the "offending thing," was alone condemned, although another vessel in tow was guilty of the same fault, to wit, failure to blow fog signals indicating that the tug had a tow. The tug *Boscobel* had the barges *Peshtigo* and *Advance* in tow. The tug *Tempest*, in a fog, passed the *Boscobel* in safety, but collided with the *Peshtigo*, the first barge in tow, because the *Peshtigo* was not blowing fog signals to indicate her position in reference to the *Boscobel*. Both tugs were held in fault and also the *Peshtigo*, but the other vessel in tow, to wit, the *Advance*, was not condemned. The damages were divided in thirds. The tug *Boscobel* and the barge *Peshtigo* were owned by the same party.

In the case of the *Lyndhurst*, 92 Fed., 681, the tow of the *Lyndhurst* consisted of a flotilla of several boats arranged in tiers. The collision occured at night between a carfloat in tow of the tug *White* and this tow. The *Drum Major*, one of the outside boats, was damaged in the collision, and the boat *Leroy*, next inside the *Drum Major*, was injured by the transmission of the blow of collision from the latter. The Court held the tow in fault for not having lights. The Court held that all the boats in the tow were interested in the performance of the duty as to the lights, and held both the *Drum Major*, the outside boat, and the *Leroy*, the inside boat, in fault, and decreed that "each canalboat should, therefore, recover two-thirds of her damages from the two tugs."

The case of the *Anerly*, 58 Fed., 794, was a case where two barges were held in fault for allowing

themselves to swing against the steamship *Anerly*, and the *Anerly* made no effort to avoid the injury which was sustained by her; the three vessels were held in fault. The District Court, on page 796, in deciding a motion made to divide the loss in the proportion of one-third to each vessel, says: "It is unnecessary to consider at this time what should be done in cases like the *Brothers*, 2 Biss., 104, and the *Peshtigo*, 25 Fed., 488, where three vessels are adjudged in fault; because in this case, before any damage arose, the two barges became entangled fast together and were practically one mass, and therefore, as respects the subsequent negligence of the steamer and the resulting damage, they should be treated as one. They did what they could to get out of the way, and to avoid the plain danger from swinging on the turn of the tide. The steamship, as I find, was culpably indifferent and made no such effort. Under such circumstances she should pay half the damages. The two barges, as between themselves, divide the other half of the damages, because it was by the fault of each barge that they got into a false position and became entangled as one mass near the steamer, and thereby caused the danger. See the *Express*, 3 C. C. A., 342; 52 Fed., 890; the *Ice King*, 52 Fed., 894."

We beg also to call the Court's attention to other interesting cases bearing upon the subject, first remarking that according to Mr. Marsden, referring to the rule in America of a division of loss between all three ships all in fault for a collision between two of them: "There is no precedent for such an extension of the *rusticorum judicium* in England."

Marsden, Coll., 5th Ed. (1904), p. 125.

The case of the *No. 6-H, et al.*, 108 Fed., 429–432. In this case suit was brought by the owner of two scows against three other scows which had tied up outside of libellant's two scows at the end of a pier, increasing the strain on the lines of libellant's scows run-

ning to the pier and resulting in the breaking away of the five scows and damage to libellant's two scows. Judge Thomas held that one-third of the damages should be borne by the libellants and two-thirds by the outlying scows, each scow bearing two-ninths of all the damage, citing the *Brothers*, 2 Biss., 104; Fed. Case No. 1969; the *Peshtigo*, 95 Fed., 488, 491, and the *Anerly*, 58 Fed., 794–796. It will be noticed that the libellant was thus allowed two-thirds of his damages, although he was at fault through the joint negligence of the two masters of his two scows. In other words, his scows were not considered as being before the Court in any sense in which libellant's rights as against the vessels proceeded against *in rem* could be affected by the number of his agents guilty of negligence. On the other hand, the scows proceeded against were condemned as "offending things," irrespective of the fact that two of them had a common owner.

See also the *W. G. Mason* (U. S. Cir. Ct. App. Sec. Cir.) 142 Fed., 913–918, where the Court, speaking of vessels proceeded against *in rem*, holds:

> "A tug and a tow are deemed a single vessel, under steam, within the meaning of the "rules of navigation for preventing collisions; "but it has never been asserted elsewhere that "they could be regarded as one vessel for the "purpose of ascertaining their relation as between themselves, or their several liabilities "to respond for the consequences of a fault of "one of them." Citing the *John Gray* vs. *The John Frazer*, 21 How., 184; *Stur[illegible]* vs. *Boyer*, 24 How., 110; *The Carrie L. Ty[illegible]*, 106 Fed., 422.

This, no doubt, refers to the decisions holding that either the tug or the tow may be separately proceeded against or held jointly if jointly in fault for damages to a third vessel in collision.

In the case of the *James Berwind*, 44 Fed., pp. 693, 697, the steamer *The City of New York*, navi-

gating in a fog encountered the steamtugs *James Berwind* and the *Young America*, having in tow a flotilla of canal boats on a hawser; the steamer sank one of the canal boats in the tow, *Held*, that the steamer and the tugs were in fault and a decree was entered against the steamer *City of New York* for one-half the damages and against the *Young America* and the *James E. Berwind* for the other half.

In the case of the *Harold*, 84 Fed., pp. 698, 704, where the tug with two barges in tow astern on long hawsers were proceeding in a fog, encountered a schooner, and a collision took place between the schooner and one of the barges in tow, all three vessels having been found in fault, the Court says:

> "The damages and costs should be divided
> "equally among the three vessels, the fault
> "of each being independent of the others."

A tug and tow, as in this case, guilty of a common fault, should be condemned to bear jointly one-half the damages due to collision with a third vessel also in fault, since the tug and tow for the purposes of navigation are deemed in law to be a single vessel under steam and subject to all the responsibilities of such a vessel under the rules, and we see no reason why they should not be deemed a single vessel for all purposes.

See the *Civilta*, 103 U. S., 701.
Sturgis v. *Boyer*, 24 How., 110.
The Mabey and *Cooper*, 14 Wall., 204.
The Virginia Ehrman and the *Agnese*, 97 U. S., 309-313.
See, also, the *L. P. Dayton* (1886), 120 U. S., 337.

THIRD.—The answer to the third question should be that the damages be equally divided between the two flotillas, and the half assessed on the south-

bound flotilla be charged half against the *Moran* and half against the two scows, the scows having a common owner.

Whether the argument proceed upon the question that the vessel or vessels causing the damage are to be considered the offending thing and liable without regard to ownership or agency (the *China*, 7 Wall. 53), or whether the offending thing is to be regarded merely as the instrument by the improper use of which the injury is inflicted by the real wrongdoer (*City of Norwich*, 118 U. S. at pp. 503–4), justice would seem to require that the person who has actually to pay should stand on an equal footing with others whose vessels are equally guilty of fault, and *a fortiori* where those other vessels are guilty of other faults contributing to the collision.

We submit that in the cases at bar the tug and tow regarded as one vessel and being guilty of a common fault should divide the damage equally with another vessel also in fault.

In apportioning the share of the damage, adjudged to be paid by the tug and tow regarded as one vessel, it might be equally divided between the tug and tow or apportioned between them according to the degree of fault.

In any event it does not seem just that the owner of scow *15-D* should be saddled with half damages and the owners of the two tugs whose fault, or faults rather, were primarily the cause of the collision, should escape with one-quarter each.

Certainly, as between the Henry DuBois Sons Company and the owner of the *Moran*, the faults are not of the same degree, because the *Moran* was found in fault for reasons other than mere failure to have lights on the tow, and if, in the first above-entitled suit, the two scows are to be treated as separate entities, and each in fault, and their owner, through its ownership of the two scows, incidentally to be condemned for one-half the damages, because of the application of the principle

under which the scows are looked to primarily as "offending things," instead of the owner being held through imputation of negligence on the part of its agents, this is eminently a case for the application of the rule of apportioning damages used in the Circuit Court of Appeals, in the case of the *Plymothian*, 68 Fed., 395, where damages were apportioned in accordance with the degree of fault in the respective vessels.

Respectfully submitted,

JAMES EMERSON CARPENTER,
SAMUEL PARK,
JAMES KEITH SYMMERS,
Proctors for Henry DuBois Sons Co.

JAMES EMERSON CARPENTER,
Of Counsel.